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Supreme Court, U.S.
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No. 02-89 JUL - 9 2002

OFFICE OF THE CLERK

In The

Supreme Court of the United States

SANDY G. TOLLETT,

Petitioner,

v.

THE CITY OF KEMAH and WILLIAM S. HELFAND,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Question Number One: Whether the district court retains its inherent authority to review an allegation for fraud on the court as stated in Rule 60(b) when it is raised at the time the case is on remand from the appellate court to redetermine and assess sanctions under Rule 37.

Question Number Two: Whether the district court retains its inherent authority to grant a new trial on evidence of fraud on the court when the evidence is introduced at the time the case is on remand from the appellate court to redetermine and assess sanctions under Rule 37.

Question Number Three: Whether a litigant is still entitled to a new trial upon a finding by the court that due to fraud upon the court perpetrated by the opposing party and opposing counsel, "the plaintiff cannot now, nor could she have ever received a fair trial" because "the records of the [employer] cannot be authenticated, having been purged by [the employer's] officials," those records being employment files of the plaintiff and of similarly situated persons in an employment discrimination case.

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Sandy G. Tollett, an individual citizen of the United States, residing in the Southern District of Texas. Petitioner has no corporate affiliations. Sandy G. Tollett was the Plaintiff in the United States District Court, and the Appellee/Cross-Appellant before the Fifth Circuit Court of Appeals.

Respondents

The City of Kemah is a municipal governmental authority incorporated under the laws of the State of Texas. Petitioner is unaware of any corporate affiliations of Respondent City of Kemah. City of Kemah was the Defendant in the United States District Court, and Appellant/Cross-Appellee before the Fifth Circuit Court of Appeals.

William S. Helfand is an individual citizen of the United States. Petitioner is unaware of any corporate affiliations of Respondent Helfand besides his law firm. William S. Helfand of the firm of Magenheim, Bateman & Helfand, was the attorney of record for City of Kemah in the United States District Court and before the Fifth Circuit Court of Appeals on the first appeal, and Appellant/Cross-Appellee before the Fifth Circuit Court of Appeals on the second appeal.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	7
Question Number One	7
Whether the district court retains its inherent authority to review an allegation for fraud on the court as stated in Rule 60(b) when it is raised at the time the case is on remand from the appellate court to redetermine and assess sanctions under Rule 37	
Question Number Two	11
Whether the district court retains its inherent authority to grant a new trial on evidence of fraud on the court when the evidence is introduced at the time the case is on remand from the appellate court to redetermine and assess sanctions under Rule 37	

TABLE OF CONTENTS – Continued

Page

Question Number Three 13

Whether a litigant is still entitled to a new trial upon a finding by the court that due to fraud upon the court perpetrated by the opposing party and opposing counsel, "the plaintiff cannot now, nor could she have ever received a fair trial" because "the records of the [employer] cannot be authenticated, having been purged by [the employer's] officials," those records being employment files of the plaintiff and of similarly situated persons in an employment discrimination case

Conclusion 15

TABLE OF AUTHORITIES

Page

CASES

Aoude v. Mobile Oil Corp., 892 F.2d 1115 (1st Cir. 1989) 13

Bush Ranch, Inc. v. E. I. DuPont de Nemours & Co., 99 F.3d 363 (11th Cir. 1996) 13

Chambers v. NASCO, Inc., 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) 6, 9, 10

Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944) 9, 10, 12

Standard Oil Co. of California v. United States, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976) 10

United States v. Buck, 281 F.3d 1336 (10th Cir. 2002) 13

United States v. Throckmorton, 98 U.S. 61 (1878) 14

Universal Oil Products Co. v. Root Refining Co., 328 U.S. 575, 66 S.Ct. 1176, 90 L.Ed. 1447 (1946) 10

STATUTES

28 U.S.C. § 1254(1) 2

42 U.S.C. § 2000e 2

TEX. LOCAL GOVT. CODE § 143.089 3

RULES

Federal Rules of Civil Procedure Rule 11 ..... 2, 5

Federal Rules of Civil Procedure Rule 37 ..... *passim*

Federal Rules of Civil Procedure Rule 60(b) ..... *passim*

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully petitions for a Writ of Certiorari to review the judgments of the Fifth Circuit Court of Appeals in this case.

OPINIONS BELOW

The first Fifth Circuit opinion (App. D at 45a) (referenced in this petition as *Tollett I*) is a per curiam opinion and not reported. *Tollett v. City of Kemah*, No. 98-20547 and No. 98-20631 (5th Cir. September 13, 1999).

The second Fifth Circuit opinion (App. A at 1a) (referenced in this petition as *Tollett II*) is reported. *Tollett v. City of Kemah*, 285 F.3d 357, 88 Fair Empl.Prac.Cas. (BNA) 596, 51 Fed.R.Serv.3d 1451 (5th Cir. 2002), *r'hrg denied*, 35 Fed.Appx. 392 (5th Cir. 2002).

The opinions and orders of the United States District Court for the Southern District of Texas, Houston Division, No. H-96-3131, are not reported.

STATEMENT OF JURISDICTION

The most recent judgment of the Fifth Circuit Court of Appeals in this case was entered on March 6, 2002. (App. A at 1a.) The Court of Appeals opinion denying Tollett's timely filed petition for rehearing en banc was filed April 10, 2002. (App. J at 59a.)

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following Federal Rules of Civil Procedure:

A. Rule 11(c), (d). Representations to Court; Sanctions. (App. K at 61a.)

B. Rule 37(b), (c), (d). Failure to Make Disclosure or Cooperate in Discovery; Sanctions. (App. L at 63a.)

C. Rule 60(b). Relief From Judgment or Order. (App. M at 66a.)

STATEMENT OF THE CASE

Tollett filed suit under Title VII, 42 U.S.C. § 2000e, asserting that her employment with the City of Kemah was tainted by sexual animus. Tollett worked for the City as a full-time reserve police officer. As part of discovery in this case, Tollett had requested her own employment file and that of similarly situated employees. (*See* Order for Sanctions, App. H at 54a.) The City failed to timely produce the records and the district court ordered the City to fully comply with Tollett's discovery requests. Instead, the City insisted that no such records existed, and the City Secretary filed an affidavit to that effect knowing that her statements would mislead the Court. (*See id.* at 55a-56a.)

At docket call, counsel for the City, William S. Helfand, again represented to the court that the records "simply don't exist." (*See* App. B at 25a.) At trial, attorney Helfand relied on the lack of documentation to attack Tollett's claim of discrimination. (*See id.* at 26a.) During testimony at trial before the jury, Deputy Chief of Police Pete Munoz revealed for the first time that employment records did exist.[1] Because of this revelation, the district court stopped the proceedings and questioned this witness and attorney Helfand outside the presence of the jury. Counsel for Tollett was not permitted to participate in questioning the witness or opposing counsel about the now existing records.

Helfand continued to insist that no records existed until the district court threatened to commence a criminal investigation. Attorney Helfand then admitted that records existed and that he would have the Police Chief bring them the following day. (*See id.* at 26a-27a.) Two file boxes of records were produced that next day.[2] (*See id.*) Tollett's counsel requested an opportunity to review the materials and/or a mistrial. The district court denied both motions. (*See id.* at 27a.) The district court ordered the records sealed and instructed the parties to proceed at

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[1] Under Texas law, it is a misdemeanor offense to fail to maintain employment files for police officers. TEX. LOCAL GOVT. CODE § 143.089.

[2] It was later determined by the district court that these employment records had been purged by the City and/or counsel for the City.

trial as if the records did not exist. The jury never knew of the existence of the purged employment files.[3]

Following a jury verdict in favor of the City, the district court entered a final judgment that Tollett take nothing by her suit. (App. I at 58a.) However, the district court granted sanctions against the City of Kemah, the City Secretary and the Deputy Chief, finding that "[t]hese perversions of the truth are serious and require serious sanctions against the individuals and the City," but only awarded Tollett the sum of $5,000.00 in attorneys fees and all court costs. (App. H at 56a.) The district court did not state under what authority it was imposing sanctions, and did not order sanctions against the City's lawyer, Helfand. The district court also denied Tollett's Motion for New Trial. (App. G at 53a.)

Both parties appealed. In the first opinion of the Fifth Circuit in this case (*Tollett I*), the court affirmed the denial of Tollett's Motion for New Trial stating that "Tollett has not directed us to, nor have we found, any evidence that would have changed the outcome of the trial." (App. D at 48a.) The Fifth Circuit also held that the sanctions were awarded pursuant to Rule 37[4] of the Federal Rules of Civil Procedure, and since the record did not contain proof of the incurred fees and expenses, remanded for a "redetermination and assessment of reasonable attorney's fees and costs under Rule 37." (App. D at 49a.)

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[3] Because of this ignorance of the records, the jury issued a note with its verdict that it was disappointed as taxpayers that the city did not maintain proper records.

[4] The court so stated that the district court had awarded sanctions under Rule 37 without any analysis of the same.

On remand, the district judge expounded on his offense at the previous perjurious and obstructionist conduct and statements made during the trial by attorney Helfand, explaining that he had entered the $5,000.00 against the City of Kemah in order to let the law firm off the hook.[5] The district judge also stated his belief that the *Tollett I* panel had ruled the record was not sufficient for him to have entered sanctions, and that he was now required to make a complete record and determine whether sanctions should be entered or not.

Prior to the sanctions hearing, Tollett filed an Amended Motion for Sanctions pursuant to the district court's inherent power under Rule 11, Rule 37, the enumerated basis for obtaining relief from a judgment under Rule 60(b)(2) & (3), and the savings clause under Rule 60(b) (no limitation upon the court's power to address fraud upon the court). Tollett sought to set aside the Final Judgment in this case, alternatively, authority to file an independent action based upon the allegation that the City of Kemah, through its officials and its attorneys, perpetrated a fraud upon the court. (*See* App. B at 24a.)

The district court held a hearing on Tollett's Amended Motion for Sanctions over a two-day period of time. The evidentiary hearing was the first time Tollett was able to explore the circumstances for the non-production of comparative employee files.

The district court, issued a Memorandum Opinion and Order and Final Judgment, awarding Sandy Tollett

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[5] The Fifth Circuit in *Tollett II* took this as evidence that the district court entered its order on remand based on vindictiveness.

$50,000.00 in sanctions against the City of Kemah and attorney William S. Helfand, jointly, under its inherent power to enter such sanctions. (App. B at 23a.) The district court concluded that "where the conduct of an attorney reaches beyond the Federal Rules of Procedure, the Court has inherent power to enter sanctions," citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50-51 (1991). (App. B at 42a.)

In the opinion, the district court detailed the testimony elicited at the hearing. (*See* App. B at 28a-40a.) The district court's Memorandum and Order was quite explicit of the conduct of the city officials and their counsel: "The nature of the conduct of attorney Helfand, officer Munoz, and secretary Pierce is that of an obstructionist. Officer Munoz, secretary Pierce and attorney Helfand, intentionally misrepresented the facts surrounding the police files to the Court. These individuals have committed perjury, suborned perjury and sponsored representations to the Court with the specific intent to mislead the Court and more importantly, deny the plaintiff a fair trial". (App. B at 41a.) "[T]he lengths to which the City and attorney Helfand went to secrete the police records strongly suggest that the records existed and were removed from the files to avoid discovery request and court orders." (App. B at 42a-43a.)

The district court found "[t]he time expended in the trial on the case was all for naught, since the evidence was intentionally destroyed by the City. The attorneys fee represents a fee for a small portion of the time expended in the trial of the case and on the motion for sanctions," and awarded attorney fees against the same parties jointly in the amount of $20,000.00. (App. B at 43a.) Yet the district court denied Tollett's request for a new trial based on the court's finding that "the plaintiff cannot now, nor could she

have ever received a fair trial" because "the records of the city of Kemah cannot be authenticated, having been purged by city officials." (App. B at 41a.)

On appeal the second time (*Tollett II*), the Fifth Circuit panel held that the district court exceeded their mandate which was merely to recalculate sanctions under Rule 37, and based upon the panel's recalculation of the sanctions originally awarded Tollett, rendered judgment against the City and its two employees, in the amount of $3,600. (App. A at 1a.) The panel so held, even though they recognized that the district court was acting pursuant to its inherent power. (*See* App. A at 2a.) Yet the panel found that the district court had no such authority to act and its only authority was to strictly follow their limited mandate. The panel also believed that the district judge "arguably" had entered the greater sanctions in its order following remand in retaliation for the City appealing his original sanction order. (*See id.)* And finally, the panel upheld the denial on remand of Tollett's motion for new trial. (App. A at 2a.)

REASONS FOR GRANTING THE WRIT

Question Number One: Whether the district court retains its inherent authority to review an allegation for fraud on the court as stated in Rule 60(b) when it is raised at the time the case is on remand from the appellate court to redetermine and assess sanctions under Rule 37.

By its decision, the panel denied Tollett her right to bring a meritorious claim for relief under the savings clause of Rule 60(b), "fraud on the court", and denied the

district court its inherent right to raise and/or review that same claim. The panel failed to recognize that at the hearing on sanctions following remand, the district court properly considered not only the mandate from the panel under Rule 37, but also the claim of fraud on the court, and therefore the district court's findings and order did not exceed the scope of the mandate. The district court retained its inherent power to protect the integrity of the court and conduct a hearing with respect to fraud and conduct encountered by the court in the proceeding before it.

The Fifth Circuit in *Tollett II* based its holding on this characterization of Tollett's amended sanctions motion:

> On 12 January, two days before the above-referenced [hearing], Tollett had filed an amended sanctions motion, again pursuant to Rules 11 and 37, seeking $150,000 in sanctions and $75,000 in attorney's fees from the City, Helfand, and Helfand's firm.[6] The motion also requested, pursuant to Rules 60(b)(2) and (3), a new trial on the basis of claimed newly discovered evidence and fraud.

(App. A at 7a.) The Court failed to include the express relief requested by Tollett under the Savings clause of Rule 60(b).

The savings clause of Rule 60(b) provides that "[t]his rule does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C.

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[6] The amended motion was filed in January, the hearing was conducted in March.

§ 1655, or to set aside a judgment for fraud upon the court." (App. M at 66a.) And this Court in *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944), explained that the rule does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause.

Here, the district court had authority based on the right of Tollett to bring an independent action and also based on the court's own inherent authority. In her amended motion for sanctions, Tollett expressly sought authority to file an independent action based on fraud upon the court. And in its opinion following remand, the district court expressly concluded that it had the authority to enter such sanctions at this point in the proceedings pursuant to its inherent power as expressed in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50-51 (1991). (App. B at 42a.)

In clear contradiction to Rule 60(b) and this Court's precedent, the Fifth Circuit in *Tollett II* expressly held that the district court retained no such inherent authority:

> The district court exceeded our mandate when it: (1) redetermined whether and against whom sanctions should be imposed; (2) *imposed sanctions and attorney's fees pursuant to its inherent power, rather than Rule 37*; and (3) assessed sanctions against Helfand, who was not sanctioned in the original order. In short, being without authority to impose those sanctions, the district court abused its discretion.

(App. A at 13a.) (Emphasis added.)

The *Tollett II* opinion is in conflict with the Supreme Court's long standing rule that a court retains broad inherent power to vacate its own judgment, as established

in *Chambers v. NASCO, Inc.*, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575, 66 S.Ct. 1176, 90 L.Ed. 1447 (1946); and *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1944). This "historic power of equity to set aside fraudulently begotten judgments," is necessary to the integrity of the courts. *Chambers*, 501 U.S. at 44 (citing *Hazel-Atlas*, 322 U.S. at 245). "Moreover, a court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud." *Id.* (citing *Universal Oil*, 328 U.S. at 580).

This Court's decision in *Standard Oil Co. of California v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976), is helpful to the question of whether the fact that this case was before the district court on remand from the Fifth Circuit would have any effect on the district court's inherent power to vacate its own judgment. Prior to this decision, the courts, including this Court, had required appellate leave before the district court could reopen a case which had been reviewed on appeal. *See Standard Oil*, 429 U.S. at 18 (citations omitted). That requirement derived from the belief that an appellate court's mandate bars the trial court from later disturbing the judgment entered in accordance with the mandate. *See id.* This Court overruled that practice in *Standard Oil* finding that, "Like the original district court judgment, the appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events. Hence the district judge is not flouting the mandate by acting on the motion." *Id.*

Therefore, regardless of whether the mandate was limited only to documenting and recalculating the $5,000

sanction award under Rule 37, the district court's second order was not an abuse of discretion because the district court had authority to consider Tollett's claim of fraud on the court, the savings clause under Rule 60(b).

Rather than directly addressing the merits of Tollett's fraud on the court claim, the court in *Tollett II* stated that, "[a]rguably, the district judge's actions equate with judicial vindictiveness" based on the statements by the district judge that he was insulted and angered. (App. A at 15a.) The court also based its holding on the law of the case doctrine. However, neither theory trumps a federal court's authority to maintain the integrity of its proceedings. In addition, the holding of *Tollett II* creates a procedural nightmare for district courts seeking to protect the integrity of the courts.

The conflict between *Tollett II* and the express language of Rule 60(b) and this Court's precedent, in addition to the importance of preserving the district court's power under the savings clause, is reason for granting the writ.

Question Number Two: Whether the district court retains its inherent authority to grant a new trial on evidence of fraud on the court when the evidence is introduced at the time the case is on remand from the appellate court to redetermine and assess sanctions under Rule 37.

While in her amended motion for sanctions, Tollett did request a new trial under the enumerated basis for requesting a new trial within one year of the judgment, she also requested a new trial pursuant to the savings clause of Rule 60(b), fraud on the court, which has no similar limitation. However, the court in *Tollett II* again rejected the trial court's authority under the savings clause and narrowed their analysis:

> A new trial would have been in excess of our mandate to only recalculate the Rule 37 attorney's fees. Along this line, in the first appeal, we rejected Tollett's claim that the judgment should have been set aside under Rule 60(b) because she had not raised that issue in district court.

(App. A at 21a.) The *Tollett II* court went on to state that:

> Assuming *arguendo* such grant would not have exceeded our mandate, a motion – as at issue here – predicated upon Rules 60(b)(1)-(3) must be filed "not more than one year after the judgment . . . was entered". Judgment was entered on 20 March 1998; the motion was not filed until 12 January 2000. Accordingly, it was untimely.

(App. A at 21a-22a.)

The holding of *Tollett II* is in direct conflict with precedent of this Court. As shown above (and incorporating that argument including case authority here), the district court had authority under Rule 60(b) to rule on Tollett's request for a new trial at the same time that the case was before it on remand from the Fifth Circuit. Furthermore, fraud upon the court under the savings clause of Rule 60(b) is distinguishable from fraud, misrepresentation, or other misconduct under Rule 60(b)(3). This Court has made clear that any limitations upon general motions for new trial are not applicable to determinations of claims of fraud on the court. "[U]nder certain circumstances, one of which is after-discovered fraud, relief will be granted against the judgments regardless of the term of their entry." *Hazel-Atlas*, 322 U.S. at 244, 64 S.Ct. at 1000.

The finding by the court in *Tollett II* denying the trial court's inherent power to fully address valid claims of fraud on the court outside the one-year limitation is also in direct

conflict with decisions from other circuits. *See, e.g., United States v. Buck*, 281 F.3d 1336 (10th Cir. 2002) (holding that a claim for fraud upon the court can either be treated as a claim in an independent action or as a motion addressed to the inherent power of the court to set aside a judgment, and that there is no set time limit for filing as to either); *Bush Ranch, Inc. v. E. I. DuPont de Nemours & Co.*, 99 F.3d 363, 367 (11th Cir. 1996) (finding every district court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud); *Aoude v. Mobile Oil Corp.*, 892 F.2d 1115, 1119 (1st Cir. 1989) ("Courts cannot lack the power to defend their integrity against unscrupulous marauders; if that were so, it would place at risk the very fundament of the judicial system.").

To uphold *Tollett II* means simply that the district court cannot consider any fraud, perjurious conduct and/or obstructionist conduct unknown to the district court prior to the conducting the hearing while the case was on remand. This surely is not the law and surely is not contemplated by the savings clause of Rule 60(b).

Question Number Three: Whether a litigant is still entitled to a new trial upon a finding by the court that due to fraud upon the court perpetrated by the opposing party and opposing counsel, "the plaintiff cannot now, nor could she have ever received a fair trial" because "the records of the [employer] cannot be authenticated, having been purged by [the employer's] officials," those records being employment files of the plaintiff and of similarly situated persons in an employment discrimination case.

After the remand, the district court conducted a hearing and discovered evidence that was far and beyond that which was known prior to the first order of sanctions.

It was at that time, the district court invoked its inherent power to protect the integrity of the Court and entered sanctions, but failed to grant a new trial. A new trial or the setting aside of the judgment should have been granted consistent with *United States v. Throckmorton*, 98 U.S. 61 (1878), in that the conduct of the City of Kemah and its attorney Helfand infected the actual judicial process.

Even in light of all of the acts, conduct of malfeasance, and disrespect for the judicial system as outlined in the district court's order, the district court failed to grant a new trial. The district court did so based on its finding that:

> The Court is convinced that the plaintiff cannot now, nor could she have ever received a fair trial. This is so because the records of the city of Kemah cannot be authenticated, having been purged by city officials. In fact, the testimony shows that officer Munoz and others went through at least their own files and purged them of unfavorable information or reports. Chief Warren testified that at least two (2) files of police officers that he knew had worked for the City were missing. Further, the fact that the Texas Municipal League would retain the plaintiff's original file throughout the trial, releasing, it only a few days before the scheduled sanctions hearing, discredits the authenticity of the plaintiff's personnel records.
>
> The record further shows that training records of most, if not all, of the relevant officers were missing. These records are the comparative records that the plaintiff would need in order to present evidence different than in the previous trial.

(App. B at 41a-42a.)

Thus, Tollett has established by clear and convincing evidence that fraud and other misconduct has prevented her from fully and fairly presenting her case. The district court has erred, not in its findings of fraud and misconduct, but in its failure to accord proper relief of a new trial. A new trial should have been ordered and/or judgment should have been set aside and judgment granted for Tollett. The evidence detailed above should have been submitted to a jury. That evidence, along with the presumption that the tampered and missing documents were favorable to plaintiff, would be sufficient to afford Tollett her day in court and overcome her burden of proof.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Fifth Circuit Opinion: *Tollett v. City of Kemah*, 285 F.3d 357, No. 00-20994 (5th Cir. March 6, 2002) 1a

APPENDIX B

District Court Opinion and Order on Remand: *Tollett v. City of Kemah*, In the United States District Court for the Southern District of Texas, Houston Division; No. H-96-3131; September 29, 2000, entered October 2, 2000 ..... 23a

APPENDIX C

District Court Final Judgment on Remand: *Tollett v. City of Kemah*, In the United States District Court for the Southern District of Texas, Houston Division; No. H-96-3131; September 29, 2000, entered October 2, 2000 ..... 44a

APPENDIX D

Fifth Circuit Per Curiam Opinion Remanding to the District Court: *Tollett v. City of Kemah*, No. 98-20547 and No. 98-20631 (5th Cir. September 13, 1999) (Summary Calendar) 45a

APPENDIX E

Fifth Circuit Judgment Remanding to the District Court: *Tollett v. City of Kemah*, No. 98-20547 and No. 98-20631 (5th Cir. September 13, 1999) 50a

APPENDIX F

District Court Order Denying the Defendant's Motion for Reconsideration of Order of Sanctions: *Tollett v. City of Kemah*, In the United States District Court for the Southern District of Texas, Houston Division; No. H-96-3131; June 2, 1998, entered June 3, 1998 ..... 52a

APPENDIX – Continued

APPENDIX G

District Court Order Denying the Plaintiff's Motion for New Trial: *Tollett v. City of Kemah*, In the United States District Court for the Southern District of Texas, Houston Division; No. H-96-3131; May 15, 1998, entered May 18, 1998 .....53a

APPENDIX H

District Court Order for Sanctions: *Tollett v. City of Kemah*, In the United States District Court for the Southern District of Texas, Houston Division; No. H-96-3131; March 23, 1998, entered March 24, 1998 .....54a

APPENDIX I

District Court Final Judgment: *Tollett v. City of Kemah*, In the United States District Court for the Southern District of Texas, Houston Division; No. H-96-3131; March 20, 1998 .....58a

APPENDIX J

Fifth Circuit Denial of Rehearing En Banc: *Tollett v. City of Kemah*, 35 Fed.Appx. 392, 2002 WL 761510, No. 00-20994 (5th Cir. April 10, 2002).....59a

APPENDIX K

Federal Rules of Civil Procedure Rule 11.....61a

APPENDIX L

Federal Rules of Civil Procedure Rule 37.....63a

APPENDIX M

Federal Rules of Civil Procedure Rule 60(b).....66a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20994

SANDY G. TOLLETT,
Plaintiff-Appellee-Cross-Appellant,
versus
THE CITY OF KEMAH,
Defendant-Appellant-Cross-Appellee,
WILLIAM S. HELFAND,
Appellant-Cross-Appellee.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Mar. 06, 2002)

Before DAVIS, WIENER, and BARKSDALE, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

For this second appeal in this action, the principal issue is whether, on remand from the first appeal, the district judge exceeded our mandate directing him to recalculate sanctions. Following her unsuccessful trial on the merits, and prior to that first appeal, plaintiff Sandy G. Tollett had been awarded sanctions (attorney's fees and all court costs) against not only the defendant, the City of

Kemah, Texas, but also two of its employees. The sanctions arose out of a discovery dispute.

Tollett conceded in the first appeal, however, that those sanctions were not supported by proof of reasonable fees and costs. Therefore, our mandate for the first appeal, consistent with the terms of the contested sanctions order, directed the district court to assess *reasonable* fees and costs, pursuant to Federal Rule of Civil Procedure 37 (failure to produce documents and to comply with discovery order). Instead, on remand, pursuant to its inherent power, the district court imposed sanctions and attorney's fees against the City and, instead of its two employees, against its counsel, William S. Helfand. Those remand-actions followed the district judge's stating he was "insulted" and "angry" because the original sanctions had been appealed.

In addition to the challenge by the City and its counsel to the revised sanctions, Sandy G. Tollett contests the denial, on remand, of a new trial.

That denial is **AFFIRMED**; the sanctions and attorney's fees awarded on remand, as well as the findings and conclusions in the post-remand orders, are **VACATED**; and judgment is **RENDERED**, with the original sanctions being recalculated in accordance with our original mandate.

I.

Most unfortunately, what should have been a simple, expeditious, and inexpensive undertaking on remand has been just the opposite, to say the least. It goes without saying that our mandate from the first opinion stands.

Therefore, it is neither necessary, much less appropriate, to question, or otherwise reconsider, the merits of the underlying discovery dispute or the correctness of either the original sanctions or our subsequent first opinion and corresponding mandate. But, to unravel the erroneous result on remand, as well as to understand why this remand-chapter was unnecessary, requires revisiting and dissecting, in considerable detail, the events leading up to, and following, our mandate for the first appeal.

A.

Tollett was a full-time, non-paid city police officer. Becoming pregnant, she left that position; on returning, she was allegedly informed she would have to retrain and would be on probationary status. As a result, she brought this action in September 1996 against the City, claiming sex discrimination, violative of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.,* and violation of the Family and Medical Leave Act, 29 U.S.C. § 2601, *et seq.*

Tollett made discovery requests in January 1997. Simply put, the City's position, as stated in the affidavit of its Secretary, further discussed below, was that it "ha[d] no records to produce of any employee or volunteer who [was], as described [earlier in the affidavit], '*similarly situated*' to Sandy Tollett". (Emphasis added.) That May, unsatisfied with the City's responses concerning police department personnel records, Tollett moved to compel. The motion was granted that June.

That October, claiming the City had failed to comply with the discovery order, Tollett moved, pursuant to Federal Rules of Civil Procedure *11 and 37,* for sanctions ($50,000) and attorney's fees ($7,500). Tollett reasserted

that motion during a pre-trial hearing; the court took it under advisement.

During the March 1998 trial, the discovery dispute over the existence of the records became hotly contested when one of Tollett's witnesses, deputy police chief Peter Munoz, acknowledged the existence of some employment records. The district court ordered that any records be produced in court the next day, and announced that, if it was shown there had been any impropriety with respect to them, it was "going to ask the FBI to go over there [to the police department] and turn that office upside down and put everybody in jail that belongs . . . there". The records were produced the next day, the last day of testimony; and the court engaged in extensive questioning about them.

A jury found for the City, with judgment entered on 20 March 1998. On 30 March, Tollett moved for a new trial pursuant to Federal Rule of Civil Procedure 59 – *not Rule 60,* as discussed *infra.*

Tollett asserted in the new trial motion: the City had improperly withheld employment records; it and its counsel had lied about the records' existence; and, had they been properly produced, the outcome of the trial would have been different. But, without explanation, the district court denied the new trial motion that May.

Earlier, however, in a 24 March order (four days after entry of judgment and six days before the new trial motion was filed), the district court had granted the sanctions motion. In the sanctions order, it made the following findings and conclusions: the City Secretary "knew that her statements in [her summary judgment] affidavit [concerning the requested records] would mislead the Court"; the Deputy Chief "knew the falsity and deception

of the City Secretary's statement. Nevertheless, he testified falsely concerning the whereabouts of the police personnel records"; and "These perversions of the truth are serious and require serious sanctions against the [two] individuals and the City". But, instead of imposing the requested extreme sanctions *and* attorney's fees, and in the light of its knowledge about, and extensive participation in resolving, the discovery dispute, it assessed $5,000 in attorney's fees and "all court costs" against the defendant City, as well as the two non-defendant employees discussed in the sanctions order, City Secretary Kathy Pierce and Deputy Chief Munoz.

The City moved the court to reconsider the award, asserting there had been no proof to support the amount awarded. The motion was denied without explanation.

Both sides appealed. The City did not challenge the imposition of sanctions, only their amount. *Nor did the two city employees contest being included among those liable for the sanctions.* The City maintained, as it had in its motion to reconsider, that Tollett had not submitted any evidence to support her fees request; and stated that the district court had "failed to articulate why it assessed the specific amount of $5,000.00 or what proof existed to support that amount".

In no respect did Tollett appeal the sanctions. Instead, she challenged only the new trial denial.

That denial was affirmed. ***Tollett v. City of Kemah,*** No. 98-20547, at 4 (5th Cir. 13 Sept. 1999) (unpublished) (***Tollett-USCA***). Concerning the City's challenge to the sanctions amount, we held: "The City contends, *and Tollett concedes,* that the sanction imposed by the [district] court *is not supported by proof of the incurred fees and expenses.*

It is necessary, therefore, to *remand for a redetermination and assessment of reasonable attorney's fees and costs under Rule 37*". ***Tollett-USCA,*** at 5 (emphasis added).

B.

On remand, the district court stated in a 15 October 1999 order: "[T]he Court is required to determine reasonable sanctions for the conduct of the defendants [sic] *and/or counsel* [not named in the original sanctions order] in failing to comply with [the] discovery request ordered by the Court". Approximately two months later, at a 6 December hearing, the following colloquy ensued:

> [COUNSEL FOR THE CITY]: As I'm sure this Court is aware, *the issue here today is solely regarding the issue of the amount of sanctions.*
>
> THE COURT: Well, I don't know that that's all that it's about, because what the Circuit Court did is I believe they said that the record was not sufficient for me to have entered sanctions. They're not saying sanctions should not have been entered. They're saying I need to make a complete record, it seems to me, and then determine whether sanctions should be entered or not. Because based on the way that I did it, the Circuit Court reversed it, I believe. Maybe I read that incorrectly, but I believe they're saying the record is insufficient to support any amount of sanctions, because it seems to me that they could have said, well, there is some evidence to support some of this, not all of this. Let's redetermine what amount, if any.
>
> . . . .

> I do not intend to walk away from this, because *I'm insulted. I'm angry by the fact that this case would go up on a simple $5,000 award that was designed to ameliorate Ms. Tollett's problem.*

(Emphasis added). The district judge stated he "had hoped that this would have gone away; . . . [he] was disappointed that the appeal was taken [by the City]"; and "it might be that the Court *ought to defy, if necessary, the Fifth Circuit* and say I'm granting a new trial and I'm going to retry this case". (Emphasis added.)

The district court ordered an evidentiary hearing to investigate the circumstances of the discovery requests and the personnel records, and advised the City to retain new counsel, opining that a conflict of interest existed between the City and its counsel, William S. Helfand. A 14 January 2000 order: set the hearing; stated who was to testify; prohibited Helfand and another member of his firm from representing the City in the proceeding; and stated the hearing was necessary "to determine whether sanctions should be imposed and, if so, against whom".

On 12 January, two days before the above-referenced order, Tollett had filed an amended sanctions motion, again pursuant to Rules 11 and 37, seeking $150,000 in sanctions and $75,000 in attorney's fees from the City, Helfand, and Helfand's firm. The motion also requested, pursuant to Rules 60(b)(2) and (3), a new trial on the basis of claimed newly discovered evidence and fraud.

Over two days that March, the evidentiary hearing was held to consider the amended sanctions request, but not that for a new trial, the district court concluding the latter had been "adequately addressed . . . in the documents and papers". That October, pursuant to its inherent

power, the court imposed against the City and Helfand $50,000 in sanctions and $20,000 in attorney's fees.

Although the district court did not expressly deny Tollett's new trial motion in that October 2000 order and an accompanying separate "FINAL JUDGMENT", it stated in the former it was "convinced . . . [Tollett] cannot now, nor could she have ever received a fair trial. This is so because the records of the city of Kemah cannot be authenticated, having been purged by city officials". In short, there is no explicit district court ruling on Tollett's Rule 60(b)(2) and (3) new trial motion.

II.

The City, Helfand, and Tollett appeal. Accordingly, at issue are: whether the sanctions exceeded our mandate; and whether a new trial should have been granted.

A.

We review for abuse of discretion the imposition of sanctions, whether pursuant to Rules 11 or 37 or the district court's inherent power. *E.g.*, ***Toon v. Wackenhut Corr. Corp.***, 250 F.3d 950, 952 (5th Cir. 2001) (sanctions imposed pursuant to court's inherent power reviewed for abuse of discretion); ***Mercury Air Group, Inc. v. Mansour***, 237 F.3d 542, 548 (5th Cir. 2001) (same for Rule 11 sanctions); ***FDIC v. Conner***, 20 F.3d 1376, 1380 (5th Cir. 1994) (same for Rule 37 sanctions). An abuse of discretion occurs where the "ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence". ***Mansour***, 237 F.3d at 548 (internal quotation marks omitted).

1.

Helfand and the City contend that the district court's redetermination, on remand, of whether, and against whom, sanctions should be imposed, exceeded our mandate (the law of the case). They maintain the district court was limited to a redetermination of the amount of sanctions, pursuant to Rule 37, to be assessed against the City and, instead of Helfand, against the two city employees.

a.

"Under the law of the case doctrine, an issue of law or fact decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal". ***United States v. Becerra,*** 155 F.3d 740, 752 (5th Cir. 1998) (internal quotation marks omitted). This doctrine is "predicated on the premise that there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members". ***Id.*** (internal quotation marks omitted).

"A corollary of the law of [the] case doctrine" is the mandate rule, which "provides that a lower court on remand must implement both the *letter and spirit* of the [appellate court's] mandate, and may not disregard the explicit directives of that court". ***Id.*** at 753 (internal quotation marks omitted; alteration in original; emphasis added). In other words, a district court "is not free to deviate from the appellate court's mandate". ***Id.*** (internal quotation marks omitted). And, in implementing the mandate, the district court should consult the reviewing court's opinion "to ascertain what was intended by [the]

mandate". ***In re Sanford Fork & Tool Co.,*** 160 U.S. 247, 256 (1895).

As a result, the district court "is without power to do anything which is contrary to either the letter or spirit of the mandate *construed in the light of the opinion of [the] court deciding the case*". ***Amer. Trucking Ass'ns, Inc. v. ICC,*** 669 F.2d 957, 960 (5th Cir. 1982) (internal quotation marks omitted; alteration in original; emphasis added), *cert. denied,* 460 U.S. 1022 (1983). Again, it must "implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces". ***United States v. Kikumura,*** 947 F.2d 72, 76 (3d Cir. 1991) (internal quotation marks omitted).

In imposing the original sanctions, the district court did not state under what authority it was acting. As noted, they had been requested pursuant to Rules 11 and 37. And, the sanctions order contains findings related to both Rules. As discussed *supra,* it also includes findings concerning the affidavit by one sanctioned City employee and the trial testimony by the other. Those two individuals' being sanctioned, in addition to the City, does not fall under either Rule. But, as noted, they did not contest the sanctions on the first appeal.

As discussed *infra,* because the original sanctions' genesis was a discovery dispute, and because they were limited to attorney's fees and court costs, they were more akin to those permitted by Rule 37. *Compare* FED. R. CIV. P. 11 ("Signing of Pleadings, Motions, and Other Papers; *Representations to Court;* Sanctions" (emphasis added)), especially subparts (c) ("Sanctions") & (d) ("Inapplicability to Discovery"), *with* FED. R. CIV. P. 37 ("Failure to Make

Disclosure or Cooperate in Discovery; Sanctions"), especially subparts (a)(4) ("Motion For Order Compelling Disclosure or Discovery" – "Expenses and Sanctions") & (b)(2) ("Failure to Comply With Order" – "Sanctions by Court in Which Action is Pending"). Moreover, for the first appeal, the City asserted, *and Tollett did not dispute,* that the sanctions had been imposed pursuant to Rule 37.

Accordingly, for that appeal, we held:

> [T]he district court abused its discretion in imposing sanctions. Under Rule 37 of the Federal Rules of Civil Procedure, a party may be *liable for reasonable expenses including attorney's fees* caused by the failure to comply with a discovery order. The language of Rule 37 provides that only the expenses and fees caused by the failure to comply may be assessed [against] the noncomplying party.
>
> The district court sanctioned the City "the sum of $5,000 in attorneys [sic] fees and all court costs. . . ." *The City contends, and Tollett concedes, that the sanction imposed by the court is not supported by proof of the incurred fees and expenses. It is necessary, therefore, to remand for a redetermination and assessment of reasonable attorney's fees and costs under Rule 37.*

Tollett-USCA, at 4-5 (third alteration in original; internal citations omitted; emphasis added). The separate mandate stated: "the cause is remanded to the District Court for reconsideration and assessment of sanctions".

Tollett maintains the district court "correctly interpreted this court's ruling as setting aside its previous ruling and a requirement that an evidentiary hearing be held to determine liability, if any, for any of the parties

subject to sanctions". This reading is totally at odds with our opinion.

Instead, it was clear from our opinion that the district court was not to redetermine the type of sanctions, or whether, and against whom, sanctions should be imposed. The opinion expressly directed the district court *only* to determine the *proper amount to impose* as *Rule 37 sanctions* (reasonable expenses, including attorney's fees). The opinion stated this was necessary because the original award was not supported by any evidence of the attorney's fees and related other expenses incurred by Tollett. There can be no dispute about that.

Tollett contends, however, that exceptions to the law of the case doctrine prevent its application here. The "doctrine . . . is not inviolate . . . . [A] prior decision of this court will be followed without re-examination . . . unless (i) the evidence on a subsequent trial was substantially different, (ii) controlling authority has since made a contrary decision of the law applicable to such issues, or (iii) the decision was clearly erroneous and would work a manifest injustice". ***Becerra***, 155 F.3d at 752-53 (internal quotation marks omitted). Tollett relies on the first and third prongs.

Tollett claims the evidence adduced during the post-remand hearing was substantially different from that before the district court prior to the first appeal. However, the "'law of the case exceptions apply only when substantially different evidence comes out in the course of a *subsequent trial authorized by the mandate*'". ***Id.*** at 754 (emphasis added; quoting ***Barber v. Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, & Helpers, District Lodge #57***, 841 F.2d 1067, 1072 n. 5

(11th Cir. 1988)). Again, our mandate did not authorize proceedings to redetermine who should be sanctioned and for what conduct; it authorized only recalculating the fees and related costs, pursuant to Rule 37. This exception does not apply.

Tollett also claims a "manifest injustice . . . would be worked if Helfand and the City are rewarded for lying to a district court". The third exception to the law of the case doctrine, however, requires that the decision that constitutes the law of the case – here, our opinion for the first appeal – be "clearly erroneous" and "work a manifest injustice". Tollett has pointed to no aspect of our opinion in the first appeal that is clearly erroneous. Likewise, she has not demonstrated how that opinion would work a manifest injustice. Quite telling on this point is Tollett's not appealing the original sanctions award. Again, the opinion simply remanded the matter for recalculation of attorney's fees and costs. This exception is also inapplicable.

The district court exceeded our mandate when it: (1) redetermined whether and against whom sanctions should be imposed; (2) imposed sanctions and attorney's fees pursuant to its inherent power, rather than Rule 37; and (3) assessed sanctions against Helfand, who was not sanctioned in the original order. In short, being without authority to impose those sanctions, the district court abused its discretion. Accordingly, the sanctions and attorney's fees awarded by the judgment entered on 2 October 2000 are vacated.

b.

It goes without saying that, as a result of the revised sanctions being vacated, the findings of fact and conclusions of law in the district court's post-remand orders, including those concerning Helfand, are vacated as well. *See, e.g.*, ***Garcia v. Queen, Ltd.***, 487 F.2d 625, 628-29 (5th Cir. 1973) (vacating findings of fact and conclusions of law where findings of fact were made in violation of Seventh Amendment right to trial by jury). As discussed below, the district court, in its original sanctions, should have addressed any wrongdoing by individuals in addition to the two it then sanctioned.

c.

It also goes without saying that a litigant's taking an appeal of right should not be a source of "insult" or "anger" for a district judge. *See* 28 U.S.C. § 1291; ***Digital Equip. Corp. v. Desktop Direct, Inc.***, 511 U.S. 863, 874 (1994) (characterizing an appeal under § 1291 as an "appeal of right"). Soon after trial, in the light of his expressed concerns, observations, and extensive questioning, especially during trial, the district judge decided on a course of action for sanctions. The district judge, as noted, was quite concerned about the discovery dispute and belated document production. As quoted earlier, his sanctions order identified "perversions of the truth [that were] serious and require[d] serious sanctions against the [two City employees discussed in the sanctions order] and the City". Therefore, he confected sanctions "designed", as he later said on remand, "to ameliorate Ms. Tollett's problem".

The new trial motion was filed only six days after the sanctions order. The assertions in that prompt new trial

motion, based on the City's production of documents on the last day of testimony, did not cause the district judge to increase, or otherwise change, the sanctions. Moreover, they were far less than those requested by Tollett; she had sought $50,000 in sanctions and $7,500 in attorney's fees. (Whether coincidental or not, on remand, the court awarded $50,000 in sanctions, the amount originally sought, but refused. Of course, on remand, Tollett had increased the requested sanctions to $150,000, together with $75,000 in attorney's fees.)

It is unknown what the district judge meant when he said, on remand, that the original sanctions had been "designed to ameliorate Ms. Tollett's problem". In any event, the City was obviously not required to agree with the district judge's view of appropriate sanctions for the discovery dispute. Nor was it, nevertheless, required to accept the sanctions as a means of putting an end to that dispute. To appeal was its right.

On remand, on this record, and notwithstanding our mandate, it was far too late in the day for the district judge, "insulted" and "ang[ered]" because the original sanctions had been appealed, to decide upon a new sanctions course of action. Again, his concerns should have been addressed and resolved by the original sanctions. Arguably, the district judge's actions equate with judicial vindictiveness. *See, e.g.,* ***North Carolina v. Pearce,*** 395 U.S. 711, 725 (1969) (holding imposition of greater penalty based upon a successful appeal violates due process); ***United States v. Schmeltzer,*** 20 F.3d 610, 612 (5th Cir.) (a litigant "has a right to appeal free from fear of judicial retaliation for exercise of that right"), *cert. denied,* 513 U.S. 1041 (1994).

2.

The district court's revised sanctions having been vacated, we must determine whether, once again, to remand for a recalculation of the fees and costs to be awarded under the original order, or whether, in the interest of judicial efficiency and economy, to assess them ourselves, pursuant to Rule 37.

In ***Sidag Aktiengesellschaft v. Smoked Foods Prods. Co., Inc.,*** 960 F.2d 564, 566-67 (5th Cir. 1992), our court held that, where "no useful purpose would be served by further delaying its final disposition, not to mention exposing the parties and this court to yet [another] appeal", we may "determine the quantum of reasonable attorney fees without the necessity of another remand" where sufficient evidence exists in the record for our rendering such an award. Accordingly, in ***Sidag,*** we awarded attorney's fees based on billing records and affidavits in the record. ***Id.*** at 567. *See* ***Cobb v. Miller,*** 818 F.2d 1227, 1235 (5th Cir. 1987) (reversing award of attorney's fees and rendering judgment in the lodestar amount).

For Rule 37 sanctions, the affidavit of movant's counsel can serve as proof of the amount to be awarded. *See, e.g.,* ***Shipes v. Trinity Indus.,*** 987 F.2d 311, 323-24 (5th Cir.) (affirming Rule 37 sanctions based upon counsel's affidavit), *cert. denied,* 510 U.S. 991 (1993). Such documents were submitted on remand by Tollett's counsel, during the March 2000 evidentiary hearing. Tollett's counsel's affidavit, with attached billing records, is the record evidence that permits us to render the award.

Along this line, and although we remanded for an assessment of reasonable attorney's fees *and costs* under

Rule 37, *see* ***Tollett-USCA***, at 5, the district court instead awarded sanctions and attorney's fees, without mention of related costs. Perhaps, this is because, in Tollett's post-remand, amended sanctions motion, she did not request related costs, nor did her counsel's affidavit and attached billing records document them. In any event, because those costs are not provided in the record, we will award only attorney's fees.

As is well established, we primarily use "the 'lodestar' method to calculate attorney's fees. [For this award, no adjustment to the calculated lodestar amount is in order.] A lodestar is calculated by multiplying the number of hours reasonably expended by *an appropriate hourly rate in the community for such work*". ***Heidtman v. County of El Paso***, 171 F.3d 1038, 1043 (5th Cir. 1999) (internal citation omitted; emphasis added). Accordingly, based on Tollett's counsel's affidavit and the attached billing records, we must determine both the reasonable amount of time expended and the corresponding reasonable hourly rate.

a.

For the reasonable time, in her original October 1997 sanctions motion, Tollett requested $7,500 in attorney's fees, asserting this amount was "reasonable and necessary in *preparation of the interrogatories, request for production,* motion to compel and motion for sanctions". (Emphasis added.) Under Rule 37, if a motion to compel is granted, the district court "shall . . . require the party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in

making the motion, including attorney's fees". FED. R. CIV. P. 37(a)(4)(A). Likewise, for failure to comply with a discovery order, the district court "shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, *caused by the failure*". FED. R. CIV. P. 37(b)(2) (emphasis added).

Pursuant to Rule 37(a)(4), Tollett may recover fees incurred for the motion to compel. Similarly, pursuant to Rule 37(b)(2), Tollett's fee request included those incurred for the original sanctions motion. But, as emphasized above, that request also sought recovery for fees incurred in formulating the underlying discovery requests.

Again, under Rule 37, a party and its counsel "can only be held responsible for the reasonable expenses [including attorney's fees] caused by their failure to comply with discovery". ***Chapman & Cole & CCP, Ltd. v. Itel Container Int'l B.V.***, 865 F.2d 676, 687 (5th Cir.), *cert. denied,* 493 U.S. 872 (1989); *see* ***Batson v. Neal Spelce Assocs., Inc.***, 765 F.2d 511, 516 (5th Cir. 1985) (the "plain language of Rule 37 . . . provides that only those expenses, including fees, caused by the failure to comply may be assessed against the noncomplying party"). Obviously, the fees incurred for the underlying discovery requests were not caused by any failure to comply. Discovery dispute or no, those fees would have been incurred.

Accordingly, under Rule 37, Tollett may recover her attorney's fees for the motions to compel and seeking the original sanctions. According to the billing records attached to Tollett's counsel's affidavit, counsel spent 12 hours preparing the motion to compel. But, there is no entry pertaining to preparation of the sanctions motion. In

addition, there is no entry regarding such work in the billing records attached to Tollett's counsel's amended affidavit. (On remand, the amended affidavit was filed after the March 2000 evidentiary hearing and, in addition to the billing records submitted with the original affidavit, included the billing records pertaining to Tollett's counsel's preparation for and appearance at that hearing.)

In sum, Tollett offered evidence that her counsel expended 12 hours for the motion to compel, but offered none regarding the original sanctions motion. Therefore, the reasonable expended time is 12 hours.

b.

As for a reasonable hourly rate, and as emphasized *supra,* the "relevant market for purposes of determining the prevailing rate to be paid in a fee award is the community in which the district court sits". ***Scham v. District Courts Trying Criminal Cases,*** 148 F.3d 554, 558 (5th Cir. 1998). Generally, the reasonable hourly rate for a particular community is established through affidavits of other attorneys practicing there. *E.g.,* ***Watkins v. Fordice,*** 7 F.3d 453, 458 (5th Cir. 1993) (party seeking fees submitted "affidavits from other attorneys in the community showing the prevailing market rates in the community"). Tollett's counsel did not offer such affidavits and, instead, as discussed *infra,* relies upon his own assertion in his affidavit that his is a reasonable rate.

In his affidavit, Tollett's counsel: states "his normal[ ] hourly rate ranges from $250.00 an hour to $500.00 an hour"; and asserts that the hourly rate stated in the billing records, $300, is reasonable. The City requests that we make a fees assessment "based on the Plaintiff's attorney

fee affidavit . . . and render judgment for the Plaintiff in that amount"; in no way does the City contest the reasonableness of the requested rate.

In addition, the City did not challenge the requested rate in district court. In fact, on remand, in opposition to the sanctions motion, the City essentially conceded the reasonableness of the hourly rate; it requested only that the district court

> carefully review [the] fee affidavit and impose an award that reflects *only* the expenses and fees caused by the City's purported failure to comply with the . . . discovery order. Even giving [Tollett's attorney] credit for having a skill commensurate with a $300 per hour fee, this amount should not exceed $5,000.

(Emphasis in original.)

We question that $300 is a reasonable hourly rate. But, only because the City has not contested it, we hold that, based on Tollett's counsel's affidavit, the reasonable hourly rate is $300. *See, e.g.,* ***Baulch v. Johns,*** 70 F.3d 813, 818 n.8 (5th Cir. 1995) (approving requested hourly rate where such rate ($250-$330 per hour) was not questioned by the opposing party or subjected to adversarial testing, but declining to opine "on whether the rate claimed would be reasonable in other cases in the Dallas area").

As a result, for the Rule 37 reasonable expenses, we award attorney's fees in the amount of $3,600: 12 hours multiplied by a $300 hourly rate. The City and the two City employees designated in the district court's 24 March 1998 sanctions order shall be jointly and severally liable for this amount.

B.

Tollett contests the denial, on remand, of her new trial motion, which she predicated on Rules 60(b)(2) and (3).* "Granting or denying a motion under Rule 60(b) is within the discretion of the district court, and we review that decision only for an abuse of discretion". ***In re Grimland, Inc.***, 243 F.3d 228, 233 (5th Cir. 2001). The district court did not abuse its discretion in not granting the motion.

1.

A new trial would have been in excess of our mandate to only recalculate the Rule 37 attorney's fees. Along this line, in the first appeal, we rejected Tollett's claim that the judgment should have been set aside under Rule 60(b) because she had not raised that issue in district court.

2.

Assuming *arguendo* such grant would not have exceeded our mandate, a *motion* – as at issue here –

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* Although the district court, as noted, did not explicitly deny that motion, the entry of its "FINAL JUDGMENT" was an implicit denial of any outstanding motions: in this instance, that for a new trial. *E.g.*, ***United States v. Depew***, 210 F.3d 1061, 1065 (9th Cir. 2000) (where judgment of conviction entered, court of appeals treated district court's failure to rule on a motion for employment of an expert witness as a denial of the motion); ***Plumeau v. Sch. Dist. # 40 County of Yamhill***, 130 F.3d 432, 439 & n.5 (9th Cir. 1997) (after entry of summary judgment, court of appeals held magistrate judge's "failure to rule on a motion is appealable" and, despite such failure to rule, considered whether magistrate judge properly denied the motion). *Despite the district court's failure to rule, neither side subsequently requested that it do so.*

predicated upon *Rules 60(b)(1)-(3)* must be filed "not more than one year after the judgment . . . was entered". Judgment was entered on 20 March 1998; the motion was not filed until 12 January 2000. Accordingly, it was untimely.

III.

This appeal underscores why the mandate rule exists and, even more so, why it must be followed. Had it been, the cost, waste, damage, and other harm occasioned by the remand proceedings and this necessary second appeal would have been avoided. Absent exceptions not here present, the mandate must be followed – *in letter and in spirit.*

For the foregoing reasons, the new trial denial is **AFFIRMED**; the sanctions and attorney's fees awarded by the final judgment entered on 2 October 2000, together with the findings and conclusions in the orders on remand, are **VACATED**; and, based upon our recalculation of the sanctions originally awarded Sandy G. Tollett, judgment is **RENDERED** against the City, Kathy Pierce, and Peter Munoz, jointly and severally, in the amount of $3,600.

AFFIRMED in PART; VACATED in PART; and RENDERED.

APPENDIX B

[SEAL]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS ENTERED

OCT - 2 2000

Michael N. Milby, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANDY G. TOLLETT,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO.
	§	H-96-3131
vs.	§	
	§	
CITY OF KEMAH,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

Before the Court is the plaintiff, Sandy G. Tollett's, amended motion for sanctions[1] brought pursuant to

[1] The plaintiff filed an original motion for sanctions (#34) on October 9, 1997. That motion resulted in sanctions of $5,000.00 against the City of Kemah, the city secretary, Kathy J. Pierce, and deputy chief of police, Pete Munoz.

Federal Rules of Civil Procedure FRCP Rules 11, 37(b)(2), 60(b)(2) and 60(b)(3). The plaintiff seeks to set aside the Final Judgment in this case, alternatively, authority to file an independent action based upon the allegation that the defendant, the city of Kemah through City officials and its attorneys perpetrated a fraud upon the court. The court received the testimony of witnesses, heard the arguments of counsel, reviewed the briefs, and concludes that the motion is meritorious.

II. PROCEDURAL HISTORY

This suit began on September 20, 1996, with the plaintiff contending that the City had treated her differently based on her gender. The plaintiff was an unpaid police officer, undergoing training with the City when she became pregnant. When the plaintiff sought to return after maternity leave and complete her training, she was informed that she would be required to start at the beginning. The plaintiff refused to start again because this request was unusual, according to her information and understanding. Moreover, she was convinced that the City created this requirement because she is female. She brought suit under the Civil Rights Act and commenced discovery.

Two discovery requests became the focus of a dispute that began before the trial of the case and have become the center of this motion. The plaintiff sought discovery by interrogatories and by request for production of documents. Because responses to the discovery request were unsatisfactory, on March 13, 1997, the plaintiff filed a motion to compel complete answers to her interrogatories and request for production of documents. On June 2, the

City responded that the documents requested for production and the information sought by the interrogatories did not exist. Alternatively, the defendant sought protection, asserting that documents were privileged under state law[2] pursuant to Texas Government Code §§ 552, 101 and 102(a). Nevertheless, the Court granted the motion to compel on June 27, ordering the City to fully comply with the discovery request.

The court entertained arguments from counsel for the parties at docket call on October 6, 1997, because the discovery dispute continued. During the exchange, counsel for the City, William Helfand, represented to the Court that the plaintiff was seeking data only on employees "similarly situated" to the plaintiff and that no such data existed. Attorney Helfand went on to represent that with the " . . . change of chiefs of police [the police department] literally lost all the records that were made under the prior administration . . . those records should exist [He stated] . . . [but] they simply don't exist. . . . " Attorney Helfand also represented to the Court that " . . . all personnel files . . . are no longer with the city of Kemah," and suggested that the former chief of police did not keep appropriate records or, alternatively, had destroyed them before leaving the office. Pursuant to the dispute, the city secretary, Kathy J. Pierce, filed an affidavit stating that there were no police officers "similarly situated" to the plaintiff.

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[2] It should be noted that the privileged and confidential invasion of privacy claim were not made when the supplemental answers were supplied to the plaintiff. These state law arguments came later.

When the trial commenced, attorney Helfand asserted to the jury in its opening statement that " . . . [T]here are no documents, no memos . . . nothing . . . ", that would suggest that the plaintiff had been discriminated against. He went on to state that there are no documents or witnesses that will surface showing that anything happened to the plaintiff. Thus, he claimed that the plaintiff had no evidence.

The trial commenced and the Court received testimony from witnesses, including then deputy chief of police, Pete Munoz. He testified that records for police officers did exist. Moreover, he asserted that he was not aware that records were missing or destroyed as represented by attorney Helfand. Because of the disparity between officer Munoz's testimony and the previous statements made by attorney Helfand, the jury was excused so that the Court could evaluate officer Munoz's testimony in light of attorney Helfand's prior representations and his opening statement.

Outside the presence of the jury the court received arguments from counsel and testimony from City officials. In this proceeding, officer Munoz admitted that he had evaluated the plaintiff and that written evaluations were made. He testified that as a sergeant he had maintained a copy and had turned a copy of such records over to officer Swinney.

In spite of the testimony, attorney Helfand continued to insist that no records existed. When the Court threatened to commence a criminal investigation, attorney Helfand responded " . . . [T]hey don't have them." Finally, attorney Helfand stated that he did not have them, but admitted that records existed and that he would have chief

Warren bring the records the following day. The following day, chief Warren produced two file boxes of personnel files for various paid and unpaid officers. The plaintiff moved for a continuance and for a mistrial.

The court denied the plaintiff's motions for continuance and for a mistrial, but took the plaintiff's motion for sanctions under advisement. The trial was concluded on March 13, with a jury verdict unfavorable to the plaintiff. Thereafter, the Court entered sanctions against the City and two officials in a final judgment. The City appealed the sanctions order. In due course, the Fifth Circuit Court of Appeals reversed the sanctions order and directed the Court to conduct a hearing.

On remand, the plaintiff amended her motion for sanctions and now seeks alternative relief. First, the plaintiff seeks a finding that a fraud has been perpetuated upon the Court through the conduct of the City and attorney Helfand. The plaintiff also seeks a finding that the evidence presented during the motion for sanctions hearing, is new evidence, revealed after the trial, and therefore, meets the standards in Federal Rules of Civil Procedure, rule 60(b)(2). Assuming that these findings are made, the plaintiff seeks a new trial and monetary sanction of $150,000 against the City and attorney Helfand, and an attorneys fee of $75,000.

III. HEARING TESTIMONY

The Court convened a hearing on the plaintiff's motion for sanctions and the received the following testimony:

A. Testimony of Kathy J. Pierce

The first witness called was Kathy J. Pierce, the city secretary for the City of Kemah. Secretary Pierce testified that she receives all citations in civil suits and, therefore, in the capacity of city secretary, received the citation in *Tollett v. City of Kemah.* Upon receipt, she forwarded a copy of the citation to the Texas Municipal League ("TML") and the city attorney, Dick Gregg.

Secretary Pierce's next contact concerning the *Tollett* case came from attorney Helfand. Attorney Helfand had been appointed by the TML to represent the City. He sought a list of former and current chiefs of police, a roster of paid officers and a roster of non-paid officers. Secretary Pierce testified that she provided only a roster of chiefs of police for year 1997, as instructed by attorney Helfand. She testified that he also requested any files ". . . . that we may have had on Ms. Tollett and similarly situated employees." Attorney Helfand defined the scope of "similarly situated" employees as " . . . [A]ny employees that were reserve, nonpaid officers that had been going through their field training, and that had left during their field training, or before it had been completed, then returned."

Secretary Pierce does not recall the date, however, at some point she obtained the plaintiff's file from the chief of police, Gary Harter, and turned it over to either attorney Gregg or the TML. During questioning, attorney Helfand asked: "Do you know whether or not you gave the file to the city attorney, Dick Gregg, during the EEOC proceedings?" To which secretary Pierce answered: "I gave the file to one of the attorneys. I don't remember. . . . It may have been Mr. Gregg during the EEOC hearings."

Secretary, Pierce also testified that she never reviewed the plaintiff's file or any of the files of the paid or nonpaid officers. Although she was involved in multiple phone conversations and face-to-face meetings with attorney Helfand and his staff, she never saw the plaintiff's motion to compel or motion for production. She testified that information that she had provided during the discovery process was obtained from either chief Warren or assistant chief Munoz.

After compiling the chiefs of police list (only two names) and obtaining a roster of paid and nonpaid officers from chief Warren and assistant chief Munoz, secretary Pierce faxed the information to attorney Helfand's office. However, she did not provide any documents from any police files concerning the roster of police officers.

Additionally, secretary Pierce testified that she was never aware that the relevant personnel files were misplaced. She never told attorney Helfand that the files had been misplaced, lost or destroyed by the former chief of police. Thus, the information and the files requested in the interrogatories and request for production were always available at city hall.

Secretary Pierce testified that she did read the interrogatories or the answers to the interrogatories before signing the affidavit attached to them. Although the affidavit certified that the answers were true and based on secretary Pierce's personal knowledge, the information came from officer Munoz. Finally, secretary Pierce testified that the term "similarly situated" was not contained in the plaintiff's interrogatories or in the production requested. She testified that her personal knowledge as to "similarly situated" persons is based on what she observed

from "the comings and goings of reserve officers" and the information that she received from that " . . . chief of police or Pete Munoz. . . . "

Finally, secretary Pierce admitted that the interrogatories requested more information than she provided. According to secretary Pierce, attorney Helfand's office instructed that in response to interrogatory number one (1) she was to provide information only for year 1997.

B. Testimony of Pete Munoz

Pete Munoz joined the Kemah police department around 1988. He served in various ranks, to include corporal, sergeant and captain prior to becoming assistant chief of police in 1995.

Regarding the cadre of officers, Munoz testified that the majority of the paid officers started with the police department as non-paid officers. Non-paid officers were field trained by one of the paid officers, such a Munoz. He testified though, that his days of field training ended when he was promoted from the position of sergeant.

However sergeant Munoz field trained the plaintiff until she left on pregnancy leave. She was merely one of several non-paid officers trained by him. Munoz testified that the field training officers were required to maintain a log on each officer in training. The log contained the days and hours of training and evaluations of the officers' progress. From time-to-time, these "time-sheets" and evaluations were turned over to captain Swinney, who was responsible for maintaining all files.

Neither before nor after becoming assistant chief of police has Munoz had responsibility for maintaining the

police officers' personnel files. In fact, he has never reviewed any of the files to determine whether the training records were appropriately maintained. While Munoz occasionally looked through the files on an as needed basis, he never saw any need to investigate the circumstances surrounding missing records. Munoz admits that the training records for each police officer are important records and that the records should be maintained in the officer's file. He testified that the fact that certain records are not in the files is extraordinary. By the time the plaintiff filed her lawsuit, officer Munoz had been assistant chief of police for over a year. He testified that he never met with anyone from attorney Helfand's office at city hall. He was never asked to gather the files of police officers. Nor did he answer any of the interrogatories or tabulated documents for the trial. Officer Munoz testified that the current chief of police, Warren, never asked him about missing records and he offered no explanation to chief Warren about the records except that former chief Harter did not keep good records.

In spite of the status of the records, Munoz testified that it is City policy to keep and maintain the type of police records that are missing. Thus, the fact that police records are missing is contrary to City policy. Finally, officer Munoz testified that he was unaware that records were sought by the plaintiff or, that an order had been entered by the Court for the production of the police records. He admits that the records would have been helpful in determining whether the field training policies were applied to the plaintiff differently than the male trainees.

C. Testimony of Weldon Keith Warren

Weldon Keith Warren became chief of police on September 29, 1995. He had heard from the mayor prior to commencing as chief that the police files were not in order and that individual police officers had gone through the files after Chief Harter left and destroyed portions of the file. Chief Warren testified that both Swinney and Munoz confirmed that the reported conduct was true. Even though he accepted the appointment to chief, chief Warren never investigated the reports concerning the files or did any inventory of the files. Moreover, he never reported the destruction of documents and files to the state Attorney General or to the Galveston County District Attorney.

During the discovery in this case, Chief Warren was consulted about the police records. In responding to an oral request for a list of police officers for years 1993 through 1996, chief Warren directed one of his officers to look through the police files on hand and prepare the list that was ultimately produced in response to the plaintiff's Interrogatories 5 and 6. Chief Warren was never told by Helfand that, along with the list of police officers, certain files and records were to be produced. In fact, chief Warren states that he never knew of the motion of production, the motion to compel, or the Court's order directing that certain police files and records be produced.

Chief Warren admits that the list produced by himself omitted at least two (2) persons whom he knew had worked for the Kemah police department. In explaining his failure to include these officers on the list he prepared, chief Warren testified that he did not know the dates of their employment and had no information on them.

However, he excluded them because the information that he had received might have been false.

Concerning the plaintiff's personnel file, chief Warren testified that the plaintiff's personnel file was a different color than the other files. He described the file as merely an empty jacket, no papers. He further testified that until recently, he never had possession of any papers associated with the plaintiff's file. Regarding the testimony and statements of attorney Helfand concerning the files, chief Warren testified that any testimony that "literally all police files and records had been lost," is untrue. Further, attorney Helfand's statement that the records were no longer with the City is false. And, attorney Helfand's statement that records had never been created on some police officers is also false.

Chief Warren testified that he apparently got the wrong impression as to what was required of the City when he talked with Helfand about the records. During the exchange conducted by the Court during the trial, chief Warren was asked where he had located the files. Attorney Helfand had represented that no records existed and they were not in the City. Chief Warren testified that the records were always in the City and that he had personally met with attorney Helfand about the records.

In reflecting on this testimony and addressing this dialogue in the sanction hearing, attorney Griffin paraphrased chief Warren's previous answer as follows: " . . . in your statement, you said back in July when I met with Mr. Helfand, I think I got the wrong impression." Chief Warren then responds: "Over the phone." Thus, in his current testimony, chief Warren states that he did not meet with attorney Helfand as he had testified during the trial.

Instead, he talked with attorney Helfand over the phone. During further cross examination, chief Warren responds that his "wrong impression" statement made during the trial was associated to "records" as opposed to "files." Thus, he suggests that there was a miscommunication between himself and attorney Helfand concerning what was requested by the plaintiff and ordered by the Court.

Finally, chief Warren related a meeting or visit to City hall by one of attorney Helfand's assistants after the court informed attorney Helfand's firm through attorney Rachel Ziolkowski that a conflict of interest had arisen between attorney Helfand's firm and the city of Kemah. Chief Warren testified that the assistant examined the City's litigation file associated with this case to determine what documents had been mailed to the City by Helfand and obtain copies of what was in the file.

D. Testimony of Rachel Ziolkowski

Rachel Ziolkowski was an associate with attorney Helfand's law firm. In fact, she began her employment with attorney Helfand's firm in February-March, 1998, after discovery in the case had been concluded, but less than a month before the trial commenced.

She testified that she believed that the Kemah police department had lost all of the police officers' training records that existed under chief Harter. Thus, her representations to the Court were based on an understanding derived from attorney Helfand's representations that the records did not exist because they had been lost or destroyed. Nevertheless, attorney Ziolkowski admitted that "there could be some records, but we do not know where they are." Thus, she suggested that they were lost.

Attorney Ziolkowski did not inform the Court prior to or during trial that attorney Helfand's representations concerning the files were untrue. In conferences during the trial between the Court and counsel, attorney Ziolkowski never came forward and reported that the City actually had the files.

Finally, attorney Ziolkowski testified that she did not participate in the discovery portion of the trial, did not interview the witnesses prior to trial, and always thought that the records sought by the plaintiff were pre-chief Warren files.

E. Testimony of William Helfand

On January 8, 1997, attorney Helfand and the firm of Magenheim, Bateman, Robinson were employed to represent the city of Kemah. The letter of engagement came from Dick Gregg, the city attorney for Kemah. Along with the engagement came, what attorney Gregg represented was, the plaintiff's file with the remark, "[T]his is all there is." By June of 1997, the pretrial discovery period was concluding and the plaintiff, as stated heretofore, sought supplemental answers to her motions for production and interrogatories.

During the plaintiff's motion for sanctions proceeding, attorney Helfand was called as a witness. Attorney Helfand testified that the answers initially given predated a meeting that he later had with chief Warren. In those answers, the City provided a roster of police officers for years 1993 to 1996. [The request sought, among other things, a roster for years 1990 through 1997.] Attorney Helfand testified that at the time that the answers to the interrogatories and production were provided, he did not

know whether the information requested existed or not. Nevertheless, from his own perspective he was satisfied that the police department had provided all the information that it had. All information had been provided to Ms. Ware and Ms. Moore of attorney Helfand's office by police officers Munoz and Swinney and the city secretary, Ms. Pierce.

Attorney Helfand testified that his firm had been told by Munoz, Sinney [sic] and Pierce that no police personnel and training files existed. Attorney Helfand represented to the Court and to opposing counsel that the former chief of police, Gary Harter had either failed to keep proper files or had destroyed the files. Alternatively the files had been destroyed by persons unknown to him. Attorney Helfand argued to the Court that the City could not produce files. The City also asserted a privilege as to the non-existent files.

To questions concerning the Court's June 27, 1997, order, attorney Helfand testified that he did not think that the Court's order covered production of police personnel files. Explaining his failure to produce, attorney Helfand testified that the Court had directed a limited production that required production of only "similarly situated" employees. Attorney Helfand admitted that no such limitation was placed in the Court's order for production. Nevertheless, he communicated that limitation to the city officials. He further testified that the meeting where the "similarly situated" limitation was communicated to city officials was in May, prior to the Court's order. Moreover, he admitted that the records sought by the plaintiff were not irrelevant to the plaintiff's case. He further testified that no one at the City told him that the files did not exist. However, he never informed the city officials' that they

were under a Court order to produce them. In spite of these failings, he insisted that no files of "similarly situated" employees exist.

Attorney Helfand also testified that in spite of the Court's order, counsel for the plaintiff and the City reached an accommodation at the docket call on October 6. He claims that Ms. Weir, from the plaintiff's counsel's office, agreed to the "similarly situated" limitation. However, three (3) days after the alleged agreement, the attorney of record, attorney Anthony Griffin, forwarded a letter and a fax to attorney Helfand that did not acknowledge any agreement. In response to questions about this disparity, attorney Helfand testified that these communications and the plaintiff's motion for sanctions, filed on October 8, did not make it clear that all files were sought, including those of similarly situated employees.

Finally, attorney Helfand testified that no one at the City told him that the files that he had represented as having been destroyed, had in fact been destroyed. To other questions, attorney Helfand admitted that the plaintiff's interrogatories and request for production sought information concerning both paid and unpaid police officers. Attorney Helfand also stated that he knew that other files existed.

VI. DISCUSSION AND ANALYSIS

The evidence shows that attorney Helfand had a different view of the Court's authority to compel the production of city record. This is evident from attorney Helfand's express intent to follow his own view of the law rather than obey the Court's order. The Court is convinced that attorney Helfand's view of the law was not genuine,

but was a ruse designed to avoid compliance. Thus, he engineered a self-created question or conflict so that he could avoid compliance with the Court order. Finally, when he was confronted with the issue of disobedience of the Court's order, he was willing to obfuscate and disparage opposing counsel and misrepresent the Court's position. He simply passed the blame of his own conduct to opposing counsel and to the Court. Consider these questions and answers:

> Q. Mr. Helfand, did you ever tell anyone at the City that you understood that they were required to produce . . . to the plaintiffs in this case the complete personnel files of all police officers employed during the period 1993 to 1996, paid and unpaid?
>
> A. No, I did not.
>
> Q. Why didn't you do that?
>
> A. Initially I didn't do it because I didn't think it would – that it was an appropriate discovery request, and that the law making those files confidential prohibited the City from doing that absent a court order.
>
> . . .
>
> And both before and after those telephone conversations, during which we discussed the fact that I felt that the appropriate inquiry would be – and that I would not oppose an order from the Court that would allow the City, notwithstanding the law of confidentiality, to produce files if there were any people

> who had been treated in a similar manner as that which was alleged by the plaintiff . . .
>
> . . .
>
> . . . [t]here was never a point in time that anybody from Mr. Griffin's office, either he or his associate, suggested that the request was for anything other than what I called similarly situated or what they originally called comparative officers.
>
> . . .
>
> . . . [t]here was never a time that there were any suggestion from anybody that there was a requirement to produce all of the files . . . .

Transcript of Hearing, [Vol. II, Nos. 7 and 8, Mar. 8, 2000].

Attorney Helfand's representation to the Court that the files were not available or were missing or destroyed, is untrue. For the first time during the sanction hearing, attorney Helfand qualified his previous representation to the Court by suggesting that he was referring only to chief Harter records. Nowhere in the previous representations to the Court had attorney Helfand qualified his representations. In fact, his representations up to and during trial, were that no records existed.

Earlier, when attorney Helfand was confronted in open court during trial concerning the whereabouts of the records, he had responded:

> "I represent a police department that when it went through a change of Chiefs of police,

> literally lost all the records that were under the prior administration."
>
> . . .
>
> Practically all of the personnel files, to the extent that they ever exited, are no longer with the City of Kemah.

Thus, during opening statements, attorney Helfand was confident in telling the jury that there were no documents or records that supported the plaintiff's case. When the Court threatened a criminal investigation, attorney Helfand again said to the Court, "They don't have them." Later in the colloquy between the Court and attorney Helfand, he modified his statement to, "I don't have the records." Finally, when the Court threatened to have federal authorities search the City's facilities for any such records, attorney Helfand remarked to the Court, "I will have the Chief bring those records tomorrow."

Without doubt, attorney Helfand knew that the personnel records of former and current police officers existed and were kept at city hall. Moreover, he was not confused at any time about the Court's order or the plaintiff's requests for documents and answers to interrogatories. Even if it could be said that he was confused, that confusion should have ended on October 9, 1997, when attorney Helfand received attorney Griffin's fax. Shortly after the fax, attorney Griffin hand-delivered a note outlining the plaintiff's demands for discovery. Assuming that attorney Helfand was of the opinion that the records that the Court had ordered produced were confidential and escaped a federal court order, he never mentioned that fact to the Court.

The nature of the conduct of attorney Helfand, officer Munoz, and secretary Pierce[3] is that of an obstructionist. Officer Munoz, secretary Pierce and attorney Helfand, intentionally misrepresented the facts surrounding the police files to the Court. These individuals have committed perjury, suborned perjury and sponsored representations to the Court with the specific intent to mislead the Court and more importantly, deny the plaintiff a fair trial.

The Court is convinced that the plaintiff cannot now, nor could she have ever received a fair trial. This is so because the records of the city of Kemah cannot be authenticated, having been purged by city officials. In fact, the testimony shows that officer Munoz and others went through at least their own files and purged them of unfavorable information or reports. Chief Warren testified that at least two (2) files of police officers that he knew had worked for the City were missing. Further, the fact that the Texas Municipal League would retain the plaintiff's original file throughout the trial, releasing, it only a few days before the scheduled sanctions hearing, discredits the authenticity of the plaintiff's personnel records.

The record further shows that training records of most, if not all, of the relevant officers are missing.[4] These

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[3] Secretary Pierce's affidavit that no "similarly situated" employees' records existed is called into question. More importantly, though, it is a false affidavit because it fails to inform the Court about lost or destroyed records that had bearing on the representation.

[4] Training records are missing for the following officers: Stephanie S. Armstrong, Paul Armand, Barry Balthrop, William Wayne Belotte, Robert Dale Beloute, Daniel J. Cantu, Lonny Carney, Anthony Robert Cartwright, Larry Caswell, Christopher Cordry, Mark D. Cruse,

(Continued on following page)

records are the comparative records that the plaintiff would need in order to present evidence different than in the previous trial.

Other misconduct occurred after the motion for sanctions was set for a hearing. Although the Court apprised attorney Ziolkowski that her firm had a conflict of interest with the City, the warnings were not heeded by attorneys Helfand and Ziolkowski.[5] The city officials and attorney Helfand's conduct not only violated state law, but by its nature violated the spirit of the federal rules of discovery and federal civil rights laws.

VII. CONCLUSION

In a circumstance where the conduct of an attorney reaches beyond the Federal Rules of Procedure, the Court has inherent power to enter sanctions. *See Chambers v. NASCO, Inc.*, 501 U.S. 32, 50-51 (1991). In this circumstance, attorney Helfand's conduct involves a cover-up in discoverable records that may or may not have existed at or about the time that the plaintiff brought suit. On this point, the witnesses' testimony is incredible. However, the

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William Clark Dubose, Thomas Lee Fowler, Gary Hartner, David Haynes and Pauline Hepster.

[5] The Court cautioned attorney Ziolkowski that she and the firm were to contact the City for the sole purpose of informing the officials of the Court's ruling, and to advise them that they would require new counsel for the sanctions hearing. The testimony shows that after this hearing, employees of attorney Helfand's firm were sent to the City, and without city official supervision or approval from the Court, examined and reviewed the documents in the City's litigation file. Contrary to the Court's instructions, attorney Helfand did not inform the city official of the Court's limitations on counsel.

lengths to which the City and attorney Helfand went to secrete the police records strongly suggest that the records existed and were removed from the files to avoid discovery request and court orders.

There is no plausible, reasonable basis for the City's and attorney Helfand's conduct. Moreover, the conduct has been vexatious and committed in bad faith. Therefore, the Court orders sanctions against the city of Kemah and attorney Helfand jointly in the amount of $50,000. In addition, the Court orders an attorney's fee against the same parties jointly in the amount of $20,000.[6]

It is so Ordered.

Signed this 29th day of September, 2000.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES
DISTRICT JUDGE

[6] The time expended in the trial of the case was all for naught, since the evidence was intentionally destroyed by the City. The attorneys fee represents a fee for a small portion of the time expended in the trial of the case and on the motion for sanctions.

APPENDIX C

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANDY G. TOLLETT, Plaintiff,	§	CIVIL ACTION NO. H-96-3131
vs.	§	
CITY OF KEMAH, Defendant.	§	

FINAL JUDGMENT

(Entered Oct. 2, 2000)

Pursuant to the Memorandum Opinion and Order entered in this case, the plaintiff, Sandra Tollett, is awarded a $50,000 sanction against the city of Kemah and attorney William S. Helfand, jointly. In addition, she is awarded an attorneys fee against the same parties jointly in the amount of $20,000.

This is a Final Judgment.

Signed this 29th day of September, 2000.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES
DISTRICT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-20547
Summary Calendar

SANDY G. TOLLETT,

Plaintiff-Appellant,

VERSUS

THE CITY OF KEMAH,

Defendant-Appellee.

No. 98-20631
Summary Calendar

SANDY G. TOLLETT,

Plaintiff-Appellee,

VERSUS

THE CITY OF KEMAH,

Defendant-Appellant.

Appeals from the United States District Court
for the Western District of Texas

(96-H-CV-3131)

(Filed Oct. 7, 1999)

Before SMITH, BARKSDALE and PARKER, Circuit Judges. PER CURIAM:*

Tollett appeals the district court's decision to deny her motion for a new trial. On cross-appeal, City of Kemah appeals the district court's order granting sanctions. We affirm the denial of motion for a new trial and remand for assessment of sanctions.

I. FACTS AND PROCEEDINGS

Sandy Tollett was hired as a full-time, unpaid police officer within the City of Kemah in August, 1993. As an unpaid officer, Tollett worked under the same conditions as the paid officers: she wore the same uniforms as paid officers, had access to patrol vehicles, and received the same training. Tollett was required to attend all mandatory meetings and was considered on-duty 24 hours a day.

When Tollett was hired, she was assigned to a field training officer, Sargeant Pete Munoz. Tollett claims that Munoz expressed dislike toward women police officers and that superior officers, including the chief of police, did not discourage Munoz's attitude. Tollett claims that she was unable to complete the minimum hour requirements for the field training because of Munoz. When she was unable to complete the minimum hours, she transferred from the field training program to bicycle patrol. Tollett subsequently left the patrol because of pregnancy. After her pregnancy, she was required to enter the field training program again.

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* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

On September 26, 1996, Tollett filed this suit pursuant to 42 U.S.C. § 2000e. On May 13, 1997, Tollett filed a motion to compel answers to her interrogatories and compel production of employment records. The City objected to the production of employment files stating that the files were privileged under Texas law. Further, the City claimed that it was conducting research to answer the interrogatories. The district court granted Tollett's request. Tollett, however, did not receive any supplemental answers to interrogatories. In addition, the City stated that it could not locate the employment files that Tollett requested.

On October 6, 1997, the court held docket call. At docket call, the City claimed that it understood the court's order to compel the production of employees' files who were similarly situated to Tollett. On October 9, 1997, Tollett filed a motion for sanctions against the City.

On March 10, 1998, the case proceeded to trial. During trial, the City produced employee files of paid and unpaid officers. Tollett moved for a mistrial in order to review the employee files. The court denied this motion. Tollett also filed a motion for a continuance to review the employment files which the district court denied.

The jury returned a verdict in favor of the City. The district court denied Tollett's motion for a new trial pursuant to Fed. R. Civ. P. 59. The court also entered an order granting Tollett's motion for sanctions, assessing $5000 in sanctions jointly and severally against the City and several employees.

II. DISCUSSION

In her first point of error, Tollett contends that the district court erred in denying her motion for a new trial pursuant to Fed. R. Civ. P. 59. We will overturn a decision denying a motion for a new trial only where we find an abuse of discretion by the district court. *See Jones v. Wal-Mart Stores, Inc.*, 870 F.2d 982, 986 (5th Cir.1989). We conclude the district court did not abuse its discretion.

In order for newly discovered evidence to warrant a new trial, we consider whether the evidence: (1) would have changed the outcome of the trial; (2) could have been discovered earlier with due diligence; and (3) is merely cumulative or impeaching. *See Diaz v. Methodist Hosp.*, 46 F.3d 492, 495 (5th Cir. 1995). Tollett has not directed us to, nor have we found, any evidence that would have changed the outcome of the trial.

In her second point of error, Tollett contends that the district court should have set aside the jury's verdict on the ground that the verdict was the result of fraud and misrepresentation pursuant to Fed. R. Civ. P. 60. Because this claim was raised for the first time on appeal, we shall not address it. *See Shanks v. Allied Signal, Inc.*, 169 F.3d 988, 993 n.6 (5th Cir. 1999).

On cross-appeal, the City contends that the district court abused its discretion in granting Tollett's request for sanctions. We review the district court's imposition of sanctions for abuse of discretion. *See Resolution Trust Corp. v. Bright*, 6 F.3d 336, 340 (5th Cir.1993). A court abuses its discretion when its ruling is based on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

We conclude that the district court abused its discretion in imposing sanctions. Under Rule 37 of the Federal Rules of Civil Procedure, a party may be liable for reasonable expenses including attorney's fees caused by the failure to comply with a discovery order. The language of Rule 37 provides that only the expenses and fees caused by the failure to comply may be assessed by the noncomplying party. *See* Fed. R. Civ. P. 37(b)(4); *Batson v. Neal Spelce Assocs., Inc.*, 765 F.2d 511, 516 (5th Cir. 1985).

The district court sanctioned the City "the sum of $5,000 in attorneys [sic] fees and all court costs. . . . " The City contends, and Tollett concedes, that the sanction imposed by the court is not supported by proof of the incurred fees and expenses. It is necessary, therefore, to remand for a redetermination and assessment of reasonable attorney's fees and costs under Rule 37.

III. CONCLUSION

For the foregoing reasons, the district court did not abuse its discretion in denying Tollett's motion for a new trial. We remand, however, for reconsideration and assessment of sanctions.

AFFIRMED and REMANDED.

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 98-20547
Summary Calendar

D.C. Docket No. 96-H-CV-3131

SANDY G TOLLETT

Plaintiff-Appellant

v.

THE CITY OF KEMAH

Defendant-Appellant

Case No. 98-20631

SANDY G TOLLETT

Plaintiff-Appellee

v.

THE CITY OF KEMAH

Defendant-Appellant

Appeals from the United States District Court for the Southern District of Texas, Houston.

(Filed Sep. 13, 1999)

Before SMITH, BARKSDALE, and PARKER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed, and the cause is remanded to the District Court for reconsideration and assessment of sanctions.

ISSUED AS MANDATE: OCT 05 1999

A true copy
Test

Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ Shari Stevenson
Deputy

New Orleans, Louisiana

APPENDIX F

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANDY G. TOLLETT, Plaintiff,	§ §	
v.	§ §	CIVIL ACTION NO. 96-3131
CITY OF KEMAH Defendant.	§ §	

ORDER

(Filed June 3, 1998)

The defendant's motion for reconsideration of order of sanctions (#66) is Denied.

It is so ORDERED.

Signed this 2nd day of June, 1998.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States
District Judge

APPENDIX G

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

SANDY G. TOLLETT,
PLAINTIFF,

v.

CIVIL ACTION NO.
H-96-~~4268~~ 3131

CITY OF KEMAH,
DEFENDANT.

ORDER (58)

(Filed March 30, 1998)

The Plaintiff's Motion for New Trial is ~~granted~~ Denied.

DONE AT HOUSTON, TEXAS on this the 15th day of May, 1998.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
UNITED STATES
DISTRICT JUDGE

APPENDIX H

(SEAL)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANDY G. TOLLETT,	§	
Plaintiff,	§	
	§	
v.	§	CIVIL ACTION NO. 96-3131
THE CITY OF KEMAH,	§	
	§	
Defendant.	§	

ORDER FOR SANCTIONS

(Filed Mar. 24, 1998)

Before the Court is the plaintiff, Sandy G. Tollett's, motion for sanction that arises as a result of the defendant, the City of Kemah's, failure to produce records requested pursuant to motion, that were later ordered by the Court.

On January 25, 1997, the plaintiff served upon the City the plaintiff's first request for production of documents pursuant to FRCP Rules 26 and 34. Among the requested items were the following requests:

"4. Please produce a copy of the plaintiff's employment file including the following:

A. all evaluations;
B. all test scores;
C. all correspondences, memorandums related to plaintiff;

D. time sheets reflecting hours worked while in your employ.

5. Please produce a list of all non-paid officers in your employment during the following years; to wit: 1993 to 1996. With respect to the list, please also provide the following:

A. names of person;
B. date hired;
C. whether still employed;
D. date terminated employ;
E. sex of person.

7. Please produce the complete employment file of all persons listed in Request No.5."

The City failed to timely produce the record and instead stated that no such records existed, or the whereabouts were unknown. Attached to the defendant's motion for summary judgment and in support of its "no records" position was the affidavit of City Secretary. In substantial part it reads:

> "The City of Kemah has not had an employee or volunteer who is "similarly situated" as the Plaintiff, Sandy Tollett, in that the Police Department has not had any other employee who was on leave for any reason who had not completed their field training either prior to taking leave or who did not agree to successfully complete the field training program upon their return from leave. Accordingly, the City has no records to produce of any employee or volunteer who is, as described, "similarly situated" to Sandy Tollett."

During the trial of the case, the City Secretary was called as a witness in the case. She testified that she does

not maintain the personnel files of the police officers. Instead, she simply maintains the payroll file.

Without doubt, the City Secretary, who had worked for the City over five (5) years, at the time, knew that she was signing an affidavit for which she was not *competent* or *qualified* to sign. She had no knowledge, personal or otherwise, on the status of the police records. She knew that a person, such as the plaintiff, who was a non-paid officer would not even show up in her payroll records. She knew that her statements in the affidavit would mislead the Court.

Similarly, Lieutenant Munoz, who had worked at the City during the relevant time and continues to this date, knew the falsity and deception of the City Secretary's statements. Nevertheless, he testified falsely concerning the whereabouts of the police personnel records. He testified that he did not know where the records were and that he had been unable to locate them save that of the plaintiff.

These perversions of the truth are serious and require serious sanctions against the individuals and the City of Kemah. It is therefore Ordered that the City Secretary, Kathy Pierce, Deputy Chief, Pete Munoz, and the City of Kemah are HEREBY severally and jointly Sanctioned, the sum of $5,000.00 in attorneys fees and all court costs, incurred by the plaintiffs in this case which sums are to be

paid to attorney Anthony P. Griffin on or before April 30, 1998.

Signed this 23rd day of March, 1998.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

APPENDIX I

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANDY G. TOLLETT, Plaintiff,	§	
v.	§	CIVIL ACTION NO. 96-3131
THE CITY OF KEMAH, Defendant.	§	

FINAL JUDGMENT

(Filed Mar. 20, 1998)

Pursuant to the Memorandum Opinion previously entered in this case and the "Jury Verdict" entered, the plaintiff shall take nothing by her suit.

This is a Final Judgment.

Signed this 20th day of March, 1998.

/s/ Kenneth M. Hoyt
KENNETH M. HOYT
United States District Judge

APPENDIX J

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-20994

SANDY G TOLLETT

Plaintiff-Appellee-Cross-Appellant

v.

THE CITY OF KEMAH

Defendant-Appellant-Cross-Appellee

and

WILLIAM S HELFAND

Appellant-Cross-Appellee

Appeals from the United States District Court for the Southern District of Texas, Houston

---

ON PETITION FOR REHEARING EN BANC

(Filed Apr. 10, 2002)

(Opinion 3/6/02, 5 Cir., ___, ___ F.3d ___)

Before DAVIS, WIENER, and BARKSDALE, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge

in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED.R.APP.P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor (FED.R.APP.P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Rhesa H. Barksdale
United States Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

APPENDIX K

Federal Rules of Civil Procedure Rule 11(c), (d)

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

. . .

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) *How Initiated.*

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an

attorney, law firm, or party to show cause why it has not violated subdivision (b) with respect thereto.

(2) *Nature of Sanction; Limitations.* A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) *Order.* When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

APPENDIX L

Federal Rules of Civil Procedure Rule 37(b), (c), (d)

Rule 37. Failure to Make Disclosure or Cooperate in Discovery; Sanctions

. . .

(b) Failure to Comply With Order.

. . .

(2) Sanctions by Court in Which Action is Pending. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or

rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

. . .

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Failure to Disclose; False or Misleading Disclosure; Refusal to Admit.

(1) A party that without substantial justification fails to disclose information required by Rule 26(a) or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the injury of the failure to make the disclosure.

. . .

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B), and (C) of subdivision (b)(2) of this rule. Any motion specifying a failure under clause (2) or (3) of this subdivision shall include a certification that the movant has in good faith conferred or attempted to confer with the party failing to answer or respond in an effort to obtain such answer or response without court action. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

APPENDIX M

Federal Rules of Civil Procedure Rule 60(b)

Rule 60. Relief From Judgment or Order

. . .

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in

the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Supreme Court, U.S.
FILED
AUG 19 2002
CLERK

No. 02-89

In the

Supreme Court of the United States

SANDY G. TOLLETT,

Petitioner,

v.

CITY OF KEMAH, TEXAS
and WILLIAM S. HEFLAND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITON TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

RESPONSE TO STATEMENT OF JURISDICTION 1

RESPONSE TO STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 18

CONCLUSION 29

APPENDIX

PLAINTIFF'S, SANDY G. TOLLETT'S, MOTION FOR NEW TRAIL 1a

PLAINTIFF'S, SANDY G. TOLLETT'S, AMENDED MOTION FOR SANCTIONS 9a

TABLE OF AUTHORITIES

CASES

AGOSTINI V. FELTON, 521 U.S. 203 (1997) 20

BENNINGFIELD V. CITY OF HOUSTON, 157 F.3D 369 (5TH CIR.1998) 26

BENNINGFIELD V. NUCHIA, 526 U.S. 1065 (1999) 26

BURGER V. CENTRAL APARTMENT MANAGEMENT, INC., 168 F.3D 875 (5TH CIR.1999) 27

CAMPANIELLO IMPORTS, LTD. V. SAPORITI ITALIA S.P.A., 117 F.3D 655 (2D CIR.1997) 28

DOLLIS V. RUBIN, 77 F.3D 777 (5TH CIR.1995) (PER CURIAM) 26

FIRST NAT. BANK OF LOUISVILLE V. LUSTIG, 96 F.3D 1554 (5TH CIR. 1996) 22, 24

GEO. P. REINTJES CO., INC. V. RILEY STOKER CORP., 71 F.3D 44 (1ST CIR 1995) 20, 23

GLEASON V. JANDRUCKO, 860 F.2D 556 (2D CIR.1988), REV'D IN PART ON OTHER GROUNDS, 869 F.2D 688 (2D CIR.1989) 25

GRAVES V. WOMEN'S PROF'L RODEO ASS'N, 907 F.2D 71 (8TH CIR.1990) 25

GREAT COASTAL EXPRESS, INC. V. INTERNATIONAL BHD. OF TEAMSTERS, 675 F.2D 1349 (4TH CIR.1982) 23, 25

H.K. PORTER CO. V. GOODYEAR TIRE & RUBBER CO., 536 F.2D 1115 (6TH CIR.1976) 25

HAZEL-ATLAS GLASS CO. V. HARTFORD-EMPIRE CO., 322 U.S. 238 (1944) 22, 25

KERWIT MEDICAL PRODUCTS, INC. V. N & H INSTRUMENTS, INC., 616 F.2D 833 (5TH CIR. 1980) 24

LOCAL 59 V. SUPERLINE TRANSPORT CO., 953 F.2D 17 (1ST CIR. 1992) 25

MATTERN V. EASTMAN KODAK CO., 104 F.3D 702 (5TH CIR.1997) 26

PAGE V. BOLGER, 645 F.2D 227 (4TH CIR.), CERT. DENIED, 454 U.S 892 (1981) 26

PORTER V. CHICAGO SCHOOL REFORM BD., 187 F.R.D. 563 (N.D. ILL. 1999) 22

ROBINSON V. AUDI AKTIENGESELLSCHAFT, 56 F.3D 1259, (10TH CIR.1995) 24

SEESE V. VOLKSWAGENWERK, A.G., 679 F.2D 336 (3D CIR. 1982) 21

SHACKELFORD V. DELOITTE & TOUCHE, LLP, 190 F.3D 398 (5TH CIR. 1999) 27

STANDARD OIL CO. OF CALIF. V. UNITED STATES, 429 U.S. 17 (1976) 20

SWITZER V. COAN, 261 F.3D 985 (10TH CIR.2001) 22

TADROS V. COLEMAN, 898 F.2D 10 (2D CIR.1990) 26

TRANSAERO, INC. V. LA FUERZA AREA BOLIVIANA, 24 F.3D 457 (2D CIR.1994) 22

TRAVELER'S INDEMNITY CO. V. GORE, 761 F.2D 1549 (11TH CIR.1985)..... 25

UNITED STATES V. BEGGERLY, 524 U.S. 38 (1998)..... 22, 25

UNITED STATES V. THROCKMORTON, 98 U.S. (8 OTTO) 61, 25 L.ED. 93 (1878)..... 23

WALLACE V. UNITED STATES, 142 F.2D 240 (2ND CIR.), CERT. DENIED, 323 U.S. 712 (1944)..... 28

WILLIAMS V. BRISTOL-MYERS SQUIBB CO., 85 F.3D 270 (7TH CIR.1996)..... 27

WILSON V. JOHN-MANSVILLE SALES CORP., 873 F.2D 869 (5TH CIR. 1989)..... 22, 24

STATUTES

42 U.S.C. §§ 2000e(f)..... 25

Respondents, the City of Kemah, Texas (the "City") and William S. Helfand ("Helfand") appear to file this brief in opposition to the petition for certiorari of Petitioner Sandy S. Tollett ("Tollett").

RESPONSE TO TOLLETT'S STATEMENT OF JURISDICTION

In the preamble of her petition, Tollett requests this Court "to review the judgments" — plural not singular — "of the Fifth Circuit in this case." In the "Opinions Below" section of her petition, she then identifies the two Fifth Circuit decisions she presumably desires the Court to review, the so-called *Tollett I* decision, handed down by the Fifth Circuit in September 1999, and the *Tollett II* decision, handed down on March 6, 2002. Obviously, since Tollett did not file her current petition within 90 days of entry of the *Tollett I* judgment, her petition for review of that judgment is time-barred. Sup. Ct. R. 13(1).

RESPONSE TO TOLLETT'S STATEMENT OF THE CASE

A. Tollett's Underlying Title VII Claim.

As City will discuss below, as one of the prerequisites for obtaining relief from the judgment under any of the subsections of Rule 60(b) is a showing of a meritorious claim or defense, the following statement of facts, not detailed in the Court of Appeals' opinion, is offered to support the City's argument here that Tollett's Title VII claim lacks merit as a matter of law and therefore any retrial of her case would be an exercise in futility.

When the City appointed Tollett to the unpaid position of reserve officer in August, 1993, she was totally inexperienced in police work. (9 Tr. 164). The City requested her to work a minimum of 32 hours per month, or 8 hours per week. (*Id.*, at 169). Although in her petition for certiorari Tollett has described herself as a "*full-time* reserve police officer" (id., at 2), in reality she worked only 40 to 45 hours *per month*, or approximately 10

to 11 hours per week. (9 Tr. 233). The City never paid her any wage or salary and never provided her any benefits, such as life or health insurance. (9 Tr. 216).[1]

In her petition for certiorari, Tollett has attempted to recast the theory of her Title VII claim as a complaint about a work environment "tainted by sexual animus." *See* Tollett's Petition, at 2. No claim for a hostile work environment was pled. Rather, the gravamen of Tollett's suit was that she was required to undergo more field training than unidentified volunteer male reservists.

At trial, Tollett testified that she believed she had completed field training in July 1994, when the chief of police at that time, Gary Harter, told her she was "good to go." (9 Tr. 175-77, 229). She was then assigned to bicycle patrol, as she requested, until September 1994. (9 Tr. 177).

In September 1994, according to Tollett's trial testimony: "I contacted Sergeant Munoz over the telephone and informed him that I was pregnant and I requested to be taken off the streets and off of bicycle patrol for my safety as well as my child's." (9 Tr. 178). Never thereafter did Tollett work for the City. (9 Tr. 179-82, 224-26).

Tollett's child was born in May 1995. When she returned to the Kemah Police Department expecting to resume her volunteer patrol duties in July 1995, a subordinate officer, Capt. Swinney, told her that her she would have to "re-train." (9 Tr. 230, 233). Tollett admitted at trial that she never took the matter up with Chief Harter, the decisionmaker in such matters for the Department. (9 Tr. 234-35, 244-45).

---

[1] Tollett testified that on a single occasion, the City paid her a small fee for executing a warrant. However, she did not report the fee on the federal income tax return she filed jointly with her husband; and the City had no record of ever paying her any fee. (9 Tr. 216-18).

Tollett further admitted that the City never fired her. (9 Tr. 202). To the contrary, she simply decided not to resume her reservist duties upon being told by Capt. Swinney that she would need to re-train. (9 Tr. 202, 206, 233-34). Tollett filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") in August 1995, almost eleven months after her last day of work as a part-time volunteer. (9 Tr. 191).

There is no evidence that all police reservists who successfully completed field training were appointed to paying jobs. Nor do Tollett's pleadings in this case allege that the City discriminated against her in any hiring decision or that it refused to offer her any *paid* job position because of her sex. She admitted at trial that she never inquired about any of the openings the City had posted for paid police officer positions, and she never applied for any such jobs. (9 Tr. 254).

B. The Discovery Order Compelling The Document Production.

In January 1997, Tollett served the City with interrogatories and requests for production. (R. 220-37). Contrary to Tollett's current characterization of the document request as one seeking the production of the personnel files of officers "similarly situated" to Tollett, it instead called for the production of the complete files of *all* city police officers employed between 1993 and 1996, regardless of whether comparable in any relevant way to Tollett. (R. 222-23). The City objected to the request for the production *en masse* of employee files. (R. 210-14).

In May 1997, Tollett filed a motion to compel. (R. 248). The part of her motion addressed to the production of employee personnel files is vague and appeared concerned only with the files of "comparative officers." (R. 241). The motion's prayer for relief is equally vague, requesting simply that the motion be granted "in all parts." (R. 239).

On June 27, 1997, in a cryptic, one-line order no more specific than Tollett's motion to compel, the District Court stated: "The plaintiff's motion to compel answers to interrogatories and documents (#14) is granted. It is so Ordered." (R. 270).

C. The City Secretary's Affidavit.

In her certiorari petition, Tollett states that the Kemah City Secretary, Kathy Pierce, filed an affidavit "to the effect that" none of the records Tollett had requested even existed, and that Pierce, in her affidavit, "knew her statements would mislead the court." This assertion is false on several levels.

To begin with, Pierce did not "file" her affidavit in court. It was intended as a supplement to Tollett's document request. The genesis of it is as follows: On October 6, 1997, at the pretrial docket call, Tollett's counsel complained to the District Court that the City still had not produced employee files for other officers, to which Mr. Helfand, the city's trial counsel, responded:

> The Plaintiff has asked for – and the Court granted a motion to compel for records and personnel files of employees who were – and I'm using quoted now because these were their words – similarly situated, discriminated against because of a pregnant condition.
>
> We reported that there were no other such employees. There were no other employees who during the time that the Plaintiff was employed even took a leave of absence for a pregnancy purpose let alone who claimed any discrimination as a result of being pregnant.

(7 Tr. 9). To address plaintiff's concerns, Mr. Helfand offered to furnish a no-records affidavit from the city secretary, averring that the City had never employed any "similarly situated" officer.

This proposal, to which plaintiff's counsel offered no objection, also appeared to satisfy the District Judge, who stated: "[P]erhaps [ ] an affidavit is the appropriate way to deal with it in light of my motion because the motion is more than simply a request, it's an order." (7 Tr. 11).

On October 20, 1997, Mr. Helfand sent Tollett's counsel a no-records affidavit executed by Ms. Pierce. (PX 13, 24). Contrary to Tollett's petition for certiorari, Pierce did not "file" it in court, and it certainly was not used to influence the Court's ruling on some motion then pending. The Pierce affidavit states in relevant part:

> The City of Kemah has not had an employee or volunteer who is "similarly situated" as the Plaintiff, Sandy Tollett, in that the Police Department has not had any other employee who was on leave for any reason who had not completed their field training either prior to taking leave or who did not agree to successfully complete the field training program upon their return from leave. Accordingly, the City has no records to produce of any employee or volunteer who is, as described, "similarly situated" to Sandy Tollett.

(PX 24). There is no evidence that anything stated in this affidavit is false.[2]

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[2] In footnote 3 of the District Court's March 2000 sanction order, the Court has labeled the affidavit as "false" . . . "because it fails to inform the Court about lost or destroyed records that had bearing on the representation." (R. 1661). This characterization is plainly wrong since the affidavit does not speak to files of anyone other officers "similarly situated" to Tollett (as the affidavit defines that term), and so Pierce's alleged failure to volunteer information in her affidavit about the files of other employees does not make the affidavit false or perjurious.

D. Helfand's Statement At Docket Call Concerning Non-Existence Of Documents.

Helfand's comments at the October 6 docket call to the effect that virtually all of the employment records kept during Chief Harter's administration were lost or missing was an inadvertent overstatement. Later at trial, as discussed below, Helfand would discover that a large cache of irrelevant employee files from Chief Harter's administration had in fact been retained. Nevertheless, the *training* records which the District Court considered relevant never surfaced, for as the Court itself noted in its March 2000 sanctions order, the training records of "most, if not all, of the relevant officers" (R. 1660) — to the extent such documents ever existed in the first place — remained missing.[3] The same can be said for other categories of

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During Tollett's tenure as an unpaid police officer, the City operated out of a 1400 square-foot converted residence. (9 Tr. 419; 2 Supp. Tr. 88). The Kemah police chief during Tollett's tenure, Harter, was the physical custodian of all of the personnel files of city police officers. Harter's successor, Warren, assumed this role when he became chief on September 29, 1995. He found the files scattered in various locations throughout the building and in a detached temporary shed outside. Warren assembled the files, organized them in folders and placed them in a central location in his office. By the time the case was tried in March 1998, the police employee files had been moved to Warren's office in the new, 3000 square-foot Kemah City Hall building. (9 Tr. 419; 10 Tr. 461; 1 Supp. Tr. 110, 115). As Muñoz testified at trial, each of these personnel files theoretically should have contained the officer's job application, state officer certification, physical fitness records, education records, and disciplinary records. (9 Tr. 321-22). In actuality, however, as reflected by the parties' inventories of the contents of the 63 personnel files Warren brought to the courthouse on the last day of trial, many of the files were deficient of these materials, most notably those of officers who had served during Chief Harter's administration. (R. 878-1063, 1242-1630; PX 18, 25; DX 1). During the transition period between chiefs, the chief's office and desk were unsecured. (1 Supp. Tr. 120). Approximately three months after Warren became chief, the Kemah mayor and three police officers informed him that other Kemah officers had entered the office and destroyed "stuff out of their own files." (*Id.*). There is no evidence of the identities those who allegedly had destroyed

documents that the files at least in theory should have contained. Thus, while it is true that at docket call Helfand inadvertently misstated the extent to which the files of Harter era officers could not be accounted for, his comments in this regard could not have amounted to a material misrepresentation, let alone a misstatement capable of preventing Tollett from having a fair trial.

E. The Trial.

The case was tried to a jury between March 10 and 13, 1998. Assistant Police Chief Pete Muñoz attended as the City's trial representative. During Tollett's tenure Muñoz had served as a corporal and a field training officer; he did not then have access to police personnel files. (9 Tr. 320, 356, 381-82; 1 Supp. Tr. 81). The custodian of the files at that time was Chief Harter, whom the City had relieved of duties on October 1, 1995, even before Tollett filed suit. (9 Tr. 356; 10 Tr. 444-46; 1 Supp. Tr. 31-32; DX 1). Since the parties could not locate Harter during the *Tollett* litigation, he was unavailable to testify at trial. (9 Tr. 356-57). Harter's second-in-command, Alonso Swinney had resigned in November 1996. (10 Tr. 450; R. 911). The Kemah chief of police at the time of trial, Keith Warren, had not been a city employee when Tollett served. (1 Supp. Tr. 110). Thus, Muñoz was the highest ranking police officer still in the City's employment who had witnessed Tollett's job performance.[4]

On March 10, 1998, during presentation of the parties' motions in limine, Tollett reurged her motion for sanctions,

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records, as no names were ever mentioned. (*Id.*, at 122). Nor does the record of the sanctions hearing indicate exactly what was destroyed or why.

[4] Muñoz was not, however, the City's custodian of police personnel records – Chief Warren was – and as the trial record abundantly shows Muñoz was not the person best qualified to testify about the contents of those files, particularly those compiled during the time of Tollett's employment when Muñoz had no access to any of them.

which the Court carried with the case. (8 Tr. 31). In the discussion that followed, Tollett's counsel argued that Pierce's affidavit certifying no records of similarly situated officers "modified what we asked for." (*Id.*, at 32). Mr. Helfand reminded the Court that during the October 6 docket call, the Court itself had indicated that a no-records affidavit of this sort "would suffice." The District Judge replied: "Well, that would suffice as far as the Court is concerned about the effort to comply [with the discovery order]. . . ." (*Id.*, at 33).

Apparently, the Court's greater concern at this point was the City's failure to have maintained complete records for all of its police officers – in the Court's mind a violation of state law relevant to the credibility of the City's witnesses. The Court would thus permit cross-examination on why such records had not been preserved. (*Id.*, at 33-36). The effect of this ruling was to put the City on trial as much for its faulty record-keeping as for its treatment of Tollett.

To the extent one reads Tollett's certiorari petition and the District Court's sanction order of October 2, 2000 as implying that Helfand had argued to the jury that the City had lost all of the personnel files of officers who had served under Chief Harter, any such implication is unfounded. During opening statement, Helfand commented only on the absence of *relevant* records of sex discrimination against Tollett:

> This lady has already admitted, and I think you will see in the evidence, there is nobody who is going to testify that decisions related to her were because she's a woman, no one. There are no documents, no memos to suggest that, nothing. . . .
>
> [I] will prove to you, and she will tell you, if she testifies consistent with her prior deposition testimony, no witnesses, no documents, absolutely nothing but her firmly held belief. And I don't mind for a second, and I will tell you

> this again later, I don't mind for a second that she thinks it, but that's not proof of it and she won't prove it to you, because she will tell you that there are no witnesses and no documents, that anything that happened to her because of the fact that she's a woman.

(8 Tr. 143-45).

> Now I've got to tell you, Chief Harter, he's not the chief anymore. He was a good cop. He was a lousy administrator. He didn't do the administrator work of his job very well, and his record keeping was dismal. This is a small police department, as Mr. Griffin correctly told you. Seven police officers worked here. Yeah, they have volunteers come in and out from time to time, but there are seven cops in the entire department. And Chief Harter did not keep very good records with respect to those individuals.
>
> But the records are not what this case is about, because there would be nothing in those records – and we have the records as they relate to Ms. Tollett, but there would be nothing in the records that would show that Ms. Tollett's treatment was because of the fact that she is a woman. And the fact that we may not have the records for somebody else has nothing to do with Ms. Tollett.

(8 Tr. 147-48).

During the trial itself, Helfand made other statements about various employee "records". In its October 2, 2000 sanction order, the District Court quoted some of these statements out of context to create the impression that Helfand, at one point in the trial, knowingly misrepresented the status of the City's police personnel files to the Court, and later, after the

Court threatened to send the FBI to City Hall, had dramatically confessed to having known the true state of the files all along. The Court's rendition of these events is as follows:

> [D]uring opening statements, attorney Helfand was confident in telling the jury that there were no documents or records that supported the plaintiff's case. When the Court threatened a criminal investigation, attorney Helfand again stated to the Court, "They don't have them." Later in the colloquy between the Court and attorney Helfand, he modified his statement to, "I don't have the records." Finally when the Court threatened to have federal authorities search the City's facilities for such records, attorney Helfand remarked to the Court, "I will have the Chief bring those records tomorrow."

(R. 1662).

For this Court to better understand the strength of the inferences the District Judge has drawn from Mr. Helfand's statements quoted above, it will be necessary here to reconstruct the actual context of each of these statements, paying close attention to how the term "records" was used each time and the particular context in which it was used.

During the trial, it was Muñoz in response to cross examination — rather than Helfand in response to the Court's threat of a criminal investigation — who first disclosed that the City had in fact been maintaining personnel files of its officers, including his own. Without hesitation, Muñoz also revealed he knew where the City had been keeping *those* files. (9 Tr. 320-21).[5]

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[5] Later in his testimony Muñoz clarified that he knew the City was maintaining the files of its "current officers"; he was unsure what remained of any of the files of officers who were no longer employed by the City when Warren became the chief. (9 Tr. 355-66).

The focus of cross-examination then shifted to an entirely different set of "records" – Muñoz's "field training records." These were records Muñoz had made of his observations of officers training under his supervision (Tollett being one). Regarding *these* records, Muñoz testified that he had made handwritten, contemporaneous notes of the dates and hours of Tollett's training sessions. Muñoz testified that he turned *these records* over to Captain Swinney, but they were not in the "employee file" produced by the City in the litigation. (9 Tr. 322-26, 336-37). *To this day Tollett's training records remain missing.*

When Muñoz later attempted to testify from memory about the number of hours per week Tollett customarily worked, the Court refused to allow it, stating:

> THE COURT: I'm not going to let him testify to those [recollections], because the Best Evidence Rule says his memory isn't worth zip unless he can establish and show where the records are and why they're not here before the Court.
>
> MR. HELFAND: I would like to make a record on this at some point, Judge.
>
> THE COURT: You certainly can. And I'm very close to asking that there be a criminal investigation involved in this situation, because it is totally outrageous that these people are violating state law and not maintaining records and then come in here and pretend that they don't know where other people's records are.
>
> MR. HELFAND: *Judge, they don't have them.* We've had this discussion with the Court before, and I don't disagree with what the Court is saying. It's clearly inappropriate.

> THE COURT: It is a violation of state law and it is a crime to destroy records when a lawsuit is implicated. It is against federal law to destroy records. The implication of all this – and if the jury was sitting over there and listening to him testify and he's on trial for his life, they wouldn't believe him, in my opinion, and they would put him in jail, because they know he's the man who created the records and they know that there are other men who helped maintain and create records and they know that those men should be here. This is a crime.
>
> MR. HELFAND: Judge, I'm not disagreeing with the Court that it may be a crime. I don't know. All I'm saying – I don't disagree, Judge. *I don't have the records.*

(9 Tr. 349-50) (emphasis added).

Viewed in proper context the "records" Helfand was referring to here were Muñoz's *time* records – records which to this day remain missing. Thus, Helfand's statements to the Court that "they" – *i.e.*, the City officials – "don't have *them*", meaning time records, and that "I don't have them", meaning time records, were all literally true.

In the next passage, the District Judge referred to "these records" as among a wider domain of "records" that he believed his one-line order had commanded the City to produce: "[W]hat I ordered was the production of these records, and they have not been produced." (*Id.*, at 350). The Court then confronted Muñoz with his earlier testimony that he knew where City was keeping its police employee files – again, a different set of "records." The Court proclaimed: "It is a falsehood, a misrepresentation, to tell the Court you have no records and then sit up here on the witness stand and say, 'I know where they're stored.'" (9 Tr. 351). Muñoz again confirmed: "I know where the *employee files* are today." (*Id.*, at 351) (emphasis added). This revelation

provoked Judge Hoyt to command the City to bring *those records* to the courtroom:

> THE COURT: Well, you go tell your client –
>
> MR. HELFAND: My client has been told numerous times –
>
> THE COURT: – I want those records here.
>
> MR. HELFAND: Judge, *I don't haven't* [sic] *those records.*"
>
> THE COURT: Have those records here tomorrow morning or you don't come back. Whoever has got them, I want them and I want them here at the courthouse and I want to look at them. And if I determine that there has been some impropriety, I am going to ask the FBI to go over there and turn that office upside down and put everybody in jail that belongs to be there.
>
> MR. HELFAND: And, Your Honor, so we understand, so we can comply, is the Court instructing that the records of officers from that time period –
>
> THE COURT: I want every personnel record of every police officer during the relevant period of time. And I better find some records.

(*Id.*, at 352-53). The Court clarified the "relevant time" as 1993, 1994, and 1995. (*Id.*, at 353-54). Helfand at this point, rather than "confessing" to having known all along of the existence of these files, continued to express doubt about whether the City really had preserved any employee files kept during the Harter administration. (9 Tr. 355).

On the following morning, March 11, 1998, Chief Warren delivered to the Court *all* of the police personnel files then in the City's custody, including those of officers who served before 1993 or after 1995. (10 Tr. 458-64).[6] Tollett then moved for a mistrial and a continuance to review the files. (10 Tr. 470). Overruling these motions, the Court announced that Tollett would be afforded an opportunity to review the files after trial and further advised that if the files were then found to contain any probative evidence, the Court would consider it as a basis both for a new trial, if Tollett then desired one, and for enhancing sanctions yet to be imposed. (10 Tr. 471).

In the meantime, as a trial sanction the Court forbade Helfand from arguing to the jury that the City had in fact kept the personnel records of other officers. Instead, the Court instructed the jury – and permitted Tollett's counsel to argue in closing, as he strenuously did – that the jury could infer from the City's failure to produce the employment files of its other officers that such records contained evidence unfavorable to the City's position. (10 Tr. 465-79, 534, 550, 561, 567-69, 602; R. 746).

On March 13, 1998, the jury refused to find that the City had discriminated against Tollett in violation of Title VII. (R. 738-39). The Court accordingly entered a take-nothing judgment for the City on March 20, 1998. (R. 754).

F. Tollett's Rule 59 Motion for New Trial.

On March 30, 1998, Tollett moved for a new trial under FED. R. CIV. P. 59 citing two grounds: (1) some of the "newly-discovered evidence" in the files could have affected the outcome of the trial, and (2) *the alleged misstatements at issue in this proceeding by Helfand and Muñoz constituted a fraud on the court.* See Respondents' Appendix, Ex. A. *The Court*

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[6] See the inventories summarizing the files which Tollett filed in connection with the first appeal, showing that Chief Warren produced files of some 63 employees consisting of 4,874 pages in all. (R. 1017-39, 1057-63, 1242-1630; PX 25; DX 1).

denied this motion without explanation on May 18, 1998. (R. 856).

G. *Tollett I*: The First Appeal.

On June 12, 1998, Tollett appealed from the denial of her motion for new trial. (R. 868). On July 1, the City cross-appealed from the $5,000 sanction order (R. 870). In her appellant's brief in *Tollett I*, Tollett challenged the District Court's refusal to grant her a new trial on the ground of fraud. Although this ground, as noted above, had been raised in Tollett's Rule 59 motion for new trial, on appeal she raised it solely in connection with a second point of error that complained of the District Court's refusal to grant her relief from the judgment under Rule 60(b)(3). (R. 1073-76, 1082-83). Tollett, however, had not yet filed a Rule 60(b) motion below. Thus, in *Tollett I* the Fifth Circuit considered Tollett's second point of error premature. *See Tollett v. City of Kemah*, No. 98-20547, at p. 4 (5th Cir. September 13, 1999) (R. 1152).

In support of her appeal, Tollett had supplemented the appellate record with summaries and voluminous excerpts of the 63 employee files produced by Chief Warren on the last day of trial. (R. 880-1063). The *Tollett I* Court, after reviewing those records, stated: "*Tollett has not directed us to, nor have we found, any evidence that would have changed the outcome of the trial.*" *Id.* (emphasis added). Accordingly, the Court affirmed the original take-nothing judgment for the City. (*Id.*).

H. Proceedings on Remand.

On October 19, 1999, the District Court entered an order setting a hearing on December 6 and stating that "[o]n remand of this case, the Court is required to determine reasonable sanctions for the conduct of the defendants [sic] and/or counsel in failing to comply with discovery request ordered by the Court." (R. 1156). At the December 6 hearing, the District Judge decided to set the matter for a full evidentiary hearing, having read *Tollett I* as "saying I need to make a complete record, it

seems to me, and then determine *whether* sanctions should be entered or not." (12 Tr. 9) (emphasis added). Setting the tone for what was then to follow, Judge Hoyt castigated the City's counsel for their successful pursuit of the City's meritorious cross-appeal:

> I do not intend to walk away from this, because I'm insulted. I'm angry by the fact that this case would go up on a simple $5,000 award that was designed to ameliorate Ms. Tollett's problem and counsel's anguish over not getting discovery that seems to me to bear substantially up on the issue of whether or not the trial itself – the entirety of the trial was circumvented. . . . I had hoped that this would have gone away; and I was disappointed that the appeal was taken, not so much, I suppose, by [Tollett's counsel] Mr. Griffin, who wanted terribly to set this case aside, I suppose, and for it to come back, but on the sanctions part. That part should have walked away. It should have been dealt with that day.

(12 Tr. 14-15).[7]

On January 12, 2002, Tollett filed what she styled an "amended motion for sanctions," requesting monetary sanctions under FED. R. CIV. P. 11 and 37 and a new trial under FED. R. CIV. P. 60(b)(2) and (3). See Respondents' Appendix, Ex. B. Tollett's fraud-on-the-court argument supporting her request for a new trial under Rule 60(b)(3) was a rehash of the same fraud-

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[7] Even before the sanctions hearing, the Court's view of the course Helfand should have followed was as follows: "Mr. Helfand should have said, look, you know, this thing is very touchy. It has criminal implications here. I have lied to the Judge. I have cheated in this process and I should back off *and I should get my client to back off with me* or pay the price for my client having done this." (12 Tr. 13) (emphasis added).

on-the-court argument the District Court had already considered, and rejected, in denying Tollett's Rule 59 motion for new trial in May 1998.

In addition, although Tollett maintains in her petition for certiorari that in her renewed motion for new trial, she moved for a new trial under not only Rule 60(b)(2) and 60(b)(3) *but also under the residual clause of Rule 60(b)*. However, a fair reading of the preamble, body, and prayer of that motion will reveal that Tollett did not move for a new trial under the residual clause. Only in a footnote of that motion did Tollett refer to a court's power to set aside a judgment in an independent action for "fraud upon the court." But even there she failed to request the Court to conduct an independent action for the purposes of obtaining relief from the judgment. See Respondents' App. B.

On January 14, 2000, the Court scheduled a hearing to "determine *whether* sanctions should be imposed and, if so, against whom." (R. 1189-90). Five persons were commanded to appear – Helfand, Warren, Pierce, Muñoz, and Ms. Rachel Ziolkowski (a lawyer associate of Helfand's). All were ordered to come "prepared to give testimony concerning personnel records kept by the City of Kemah in light of the Court's pretrial orders [sic] to provide those records to the plaintiff and her counsel." (*Id.*).

On March 7 and 8, 2000, the District Court held an evidentiary hearing on Tollett's amended motion for sanctions. At the outset of the hearing the Court stated that it did not consider the evidentiary hearing applicable to Tollett's Rule 60(b) motion for new trial, since the Court viewed that motion as sufficiently addressed by the documents and court papers already on file. (1 Supp. Tr. 4). In this regard the Court stated:

> All right. I recognize, Mr. Griffin, that you have raised — in addition to the question of your motion, should I say, for sanctions and/or supplemental motion or amended motion, let's call it — in addition to that, you have raised a

> basis, at least in your motion — let's see if it is contained — yes, in that same motion for amended sanctions, you have raised a 60(b) question and whether or not that should apply. And I believe that the parties — and I say parties meaning the City of Kemah as well as you — have adequately addressed that in the documents and papers. *So, I am not going to focus on that aspect of your motion from an evidentiary perspective.*

Id. (emphasis added). When then asked by the Court if the parties had any objection to this approach, Tollett's counsel stated he had none. *Id.*

REASONS FOR DENYING THE WRIT

On October 2, 2000, the District Court implicitly denied Tollett's Rule 60(b) motion for new trial. In *Tollett II*, the Fifth Circuit affirmed this ruling. Tollett's petition for certiorari is confined to those rulings of the lower courts. Tollett has not challenged the Fifth Circuit's reversal of the inherent power sanction award against the City and Helfand, and she has not challenged the Fifth Circuit's reversal of the factual findings made by the District Court in support of that sanction.

A. The Mandate Rule Bars Tollett's Rule 60(b) Motion.

Tollett's first two points of error appear to be shades and phases of the same contention that the Fifth Circuit, in *Tollett II*,

> denied Tollett her right to bring a meritorious claim for relief under the savings clause of Rule 60(b), "fraud on the court", and denied the district court its inherent right to raise or review that claim. The panel failed to recognize that at the hearing on sanctions following remand, the district court properly considered not only the

> mandate from the panel, but also the claim of fraud on the court, and therefore the district court's findings and order did not exceed the scope of the mandate.

Petition, at p.8.

Before turning to the merits of this argument, Respondents must first rebut the two misstatements of record which are built into it: First, as noted above, Tollett's motion for new trial at issue is not an independent action under the residual clause of Rule 60(b). The only subsections of Rule 60(b) on which Tollett moved for relief, in the preamble, body, and prayer of that motion, are Rules 60(b)(2) and 60(b)(3), which the Court of Appeals correctly held to be time-barred. *See* App. B.

Second, Tollett has mischaracterized the nature of the March 2000 sanctions hearing by treating it as if it were an independent action under the residual clause of Rule 60(b). At no time before or during that hearing did the District Judge take the view that the matter before him was an independent action to set aside the judgment. *To the contrary, on March 7, 2000, at the outset of the sanctions hearing, the District Judge stated expressly on the record that he did not consider the evidentiary hearing to be applicable to Tollett's Rule 60(b) motion for new trial, since the Court viewed that motion as sufficiently addressed by the briefing and documents already on file.* (1 Supp. Tr. 4).

Accordingly, contrary to Tollett's argument on certiorari, the Fifth Circuit did not "deny Tollett her right to bring a meritorious claim for relief under the savings clause of Rule 60(b)" — for she did not bring any such claim. Nor did the Fifth Circuit deny the District Court "its inherent right to raise or review" such a claim — for the District Court made it absolutely clear that the evidentiary hearing in March 2000 was held only to determine what kind of sanction to impose, if any, and not to decide Tollett's motion for new trial.

Finally, Tollett's argument that the mandate rule does not bar her Rule 60(b) motion, whatever its basis, is also unavailing. "[R]elitigation of the legal or factual claims underlying the original judgment is not permitted in a Rule 60(b) motion or an appeal therefrom." *Agostini v. Felton*, 521 U.S. 203, 257 (1997) (Ginsburg, J., dissenting); 11 Wright, Miller, & Kane, FED. PRAC. & PROC. 2d § 2863, p. 340 (Rule 60(b) "does not allow relitigation of issues that have been resolved by the judgment"); *Geo. P. Reintjes Co., Inc. v. Riley Stoker Corp.*, 71 F.3d 44, 49 (1st Cir 1995) ("Rule 60(b) does not license a party to relitigate, whether via motion *or independent action*, any issues that were made or open to litigation in the former action where he had a fair opportunity to make his claim or defense.") (emphasis added; internal quotations deleted).

As discussed above, after the original judgment in this case was entered, Tollett moved for a new trial under Rule 59 on the grounds of fraud on the court and newly discovered evidence. The District Court denied Tollett's Rule 59 motion. Accordingly, subsumed in the original judgment is the District Court's refusal to set that judgment aside on the ground of fraud, and the mandate in *Tollett I* did not authorize the District Court to relitigate that same question under the guise of a Rule 60(b) motion. But Tollett's Rule 60(b) motion attempts to do just that — it is a rehash of her Rule 59 motion which the District Court had already denied, a ruling Tollett could have appealed to the Fifth Circuit in *Tollett I*. Rule 60(b) is not an exception to the doctrine of res judicata once the matter has, as it was in this case, been fully and fairly litigated in a previous motion for new trial.

For this reason, Tollett's reliance on *Standard Oil Co. of Calif. v. United States*, 429 U.S. 17 (1976), is misplaced. It holds merely that a Rule 60(b) motion may be filed in the district court, even after the judgment has been affirmed on appeal, but *only where the movant seeks relief from the judgment based on information not before the district court when it ruled initially. Id.*, at 18-19. Tollett's Rule 60(b) motion was based on precisely the same information she presented to the District

Court in her Rule 59 motion, and the matter was thus includable in the *Tollett I* appeal. *See Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337 & n.1 (3d Cir. 1982) (distinguishing *Standard Oil* and holding that "[t]he district court is without jurisdiction to alter the mandate of this court on the basis of matters included *or includable* in defendants' prior appeal") (emphasis added).

B. Tollett's Rule 60(b)(2) & (3) Motions Are Time-Barred.

Alternatively, as the *Tollett II* Court further held, *assuming arguendo* the grant of a new trial would not have exceeded the *Tollett I* mandate, Tollett's Rule 60(b) motion at issue here, predicated as it was on Rules 60(b)(2) and (3), needed to be filed "not more than one year after the judgment ... was entered." FED. R. CIV. P. 60(b). Since it was filed 24 months after the original judgment, it was, as *Tollett II* correctly holds, untimely. In her petition for certiorari, Tollett does not complain of any error in this alternative ground.

C. In Any Event, The District Court Did Not Abuse Its Discretion In Denying Tollett's Motion For New Trial.

1. Waiver.

As noted above, Tollett's Rule 60(b) motion for new trial does not purport to be an independent action under the residual clause of Rule 60(b). The only subsections of Rule 60(b) on which Tollett moved for relief, both in the preamble of her motion and the prayer, are Rules 60(b)(2) and 60(b)(3), which the Court of Appeals correctly held to be time-barred. *See* Respondents' Ex. B. During the March 7-8 sanctions hearing, the District Court correctly decided that it would be able to decide Tollett's Rule 60(b) motion on the written motion papers without the need to conduct any trial on the merits of a claim of fraud on the court, and Tollett did not object to this approach.

2. No Fraud On The Court Shown.

Furthermore, even if Tollett had properly preserved her present argument about the denial of relief under Rule 60(b)'s residual clause, the District Court can hardly be said to have abused its discretion in denying such relief. *See Switzer v. Coan*, 261 F.3d 985, 988 (10th Cir.2001) (appellate court reviews disposition of action for fraud upon the court under abuse-of-discretion standard).

Fraud of the type necessary to sustain an independent action attacking the finality of a judgment — "fraud upon the court" — is far narrower in scope than that sufficient for relief by timely motion under Rule 60(b)(3). *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-46 (1944); *First Nat. Bank of Louisville v. Lustig*, 96 F.3d 1554, 1573 (5th Cir. 1996); *Porter v. Chicago School Reform Bd.*, 187 F.R.D. 563, 565-66 (N.D. Ill. 1999); 12 MOORE'S FEDERAL PRACTICE 3d, at § 60.21[4]. "[F]ar more than an injury to an individual litigant," it "embraces 'that species of fraud which does or attempts to defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases presented for adjudication.'" *Transaero, Inc. v. La Fuerza Area Boliviana*, 24 F.3d 457, 460 (2d Cir.1994) (quoting *Kupferman v. Consol. Research and Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir.1972)); *see also Wilson v. John-Mansville Sales Corp.*, 873 F.2d 869, 872 (5th Cir. 1989).[8]

This Court has held that an independent action under the residual clause must, "if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherence to the doctrine of res judicata." *United States v. Beggerly*, 524 U.S. 38, 46 (1998) (quoting

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[8] The only similarity between the standard for establishing fraud under Rule 60(b)(3) and fraud on the court is that both species of fraud must be proved by clear and convincing evidence. 12 MOORE'S FEDERAL PRACTICE § 60.21[4][b] (3d ed. 1999).

Hazel-Atlas Glass Co., 322 U.S. at 244). Courts and authorities agree that "fraud upon the court" must be narrowly construed so that this "otherwise nebulous concept" does not "overwhelm the specific provision of 60(b)(3) and its time limitation and thereby subvert the balance of equities contained in the Rule." *Great Coastal Express, Inc. v. International Bhd. of Teamsters*, 675 F.2d 1349, 1356 (4th Cir.1982) (citing numerous cases). Because the power to vacate a judgment for fraud upon the court is so free from procedural limitations, it "is limited to fraud that 'seriously' affects the integrity of the normal process of adjudication," 12 Moore, *Moore's Federal Practice* ¶ 60.21[4][a] (3d ed.1999). For example, fraud upon the court includes fraud by bribing a judge, or tampering with a jury, or fraud by an officer of the court, including an attorney. *See id.* ¶¶ 60.21[4][a], [b].

Fraud between parties, therefore, "is not fraud on [the] court" even if it involves "[p]erjury by a party or witness." *Id.* ¶¶ 60.21[4][c]; *see also, e.g., United States v. Throckmorton*, 98 U.S. (8 Otto) 61, 66, 25 L.Ed. 93 (1878) ("The doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence"); *Geo. P. Reintjes Co. v. Riley Stoker Corp.*, 71 F.3d 44, 49 (1st Cir.1995) ("perjury alone, absent allegation of involvement by an officer of the court ... has never been sufficient [to constitute fraud upon the court justifying collateral attack]") (citing numerous cases).

Moreover, as the Tenth Circuit has stated:

> "fraud on the court," whatever else it embodies, requires a showing that one has acted with an intent to deceive or defraud the court. A proper balance between the interests underlying finality on the one hand and allowing relief due to inequitable conduct on the other makes it essential that there be a showing of conscious wrongdoing — what can properly be characterized as a deliberate scheme to defraud

> — before relief from a final judgment is appropriate.... Thus, when there is no intent to deceive, the fact that misrepresentations were made to a court is not of itself a sufficient basis for setting aside a judgment under the guise of "fraud on the court."

Robinson v. Audi Aktiengesellschaft, 56 F.3d 1259, 1267 (10th Cir.1995).

Since Tollett's allegations do not begin to approach the demanding standard for setting aside a judgment under the residual clause of Rule 60(b), the District Court could not have abused its discretion denying such relief. Tollett's contention is simply: (1) the City Secretary signed an affidavit which is literally true but which, according to Tollet, was "misleading" in some undefined respect; (2) the City failed to timely produce its existent employee files in discovery — files which the Fifth Circuit in *Tollett I* reviewed and found to be legally irrelevant; (3) the City's counsel, Helfand, overstated at docket call that the City was unable to account for *any* of its police employee files (when in fact the City did have possession of numerous irrelevant files and could not account for numerous others which were then and remain today lost); (4) Helfand truthfully argued to the jury that Tollett can point to no documents establishing that she is a victim of sex discrimination, an argument which even today remains true; and (5) training records which have never surfaced in the litigation remain unaccounted for.

It is well established that allegations of non-disclosure of documents during pretrial discovery do not constitute grounds for an independent action under Rule 60(b). *First Nat'l Bank*, 96 F.3d at 1573; *Wilson*, 873 F.2d at 872; *Kerwit Medical Products, Inc. v. N & H Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980); 12 MOORE'S FEDERAL PRACTICE 3d, at § 60.21[4][c].[9] Nor do allegations of perjury by a witness.

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[9] See also *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d

Hazel-Atlas, 322 U.S. at 245.[10] Thus, Tollett's attempt to bootstrap a discovery dispute into a fraud claim is unavailing.

3. Futility Of A New Trial.

As an "additional requirement," the party seeking relief under the residual clause of Rule 60(b) must prove that the evidence in question "would have changed the outcome of the original action." *United States v. Beggerly*, 524 U.S. at 47 n.4 (citing *Pickford v. Talbott*, 225 U.S. 651, 657 (1912)). That is, to merit Rule 60(b) relief of any kind, the movant must make a threshold showing that she has a meritorious claim or defense — "that vacating the judgment will not be an empty exercise." 12 MOORE'S FEDERAL PRACTICE 3d § 60.24[1], at 60-77 (quoting *Local 59 v. Superline Transport Co.*, 953 F.2d 17, 20 (1st Cir. 1992)).

Accordingly, the District Court could not have abused its discretion in denying such relief because, as a matter of law, Tollett cannot prevail on the merits of her Title VII claim. Any retrial of this case would be futile for at least the following two reasons.

First, Tollett was not an "employee" within the meaning of Title VII, 42 U.S.C. §§ 2000e(f). Her volunteer status was part-time, without pay or benefits. *See Graves v. Women's Prof'l Rodeo Ass'n*, 907 F.2d 71, 73 (8th Cir.1990) (compensation is an

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1115, 1118 (6th Cir.1976); *Traveler's Indemnity Co. v. Gore*, 761 F.2d 1549, 1551-52 (11th Cir.1985) (failure to disclose documents during discovery).

[10] *See also Great Coastal Express, Inc. v. International Brotherhood of Teamsters*, 675 F.2d 1349, 1357 (4th Cir.1982) ("[p]erjury and fabricated evidence are evils that can and should be exposed at trial, and the legal system encourages and expects litigants to root them out as early as possible"), *cert. denied*, 459 U.S. 1128 (1983);*Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir.1988) (after discovered evidence of perjury does not support finding of fraud on the court), *rev'd in part on other grounds*, 869 F.2d 688 (2d Cir.1989).

"essential condition to the existence of an employer-employee relationship"); *Tadros v. Coleman*, 898 F.2d 10, 11 (2d Cir.1990) (upholding the dismissal of Title VII claims of volunteer member of college faculty; since defendant did not both control his work *and pay him*, plaintiff was not an employee). She had unilateral power to decide when or whether to leave for health reasons, and it was she who dictated when, if ever, she would return.

Second, even if Tollett could be regarded a prospective "employee" within the meaning of Title VII when she returned from her ten-month leave of absence to have a baby, the City did not take any "ultimate employment action" cognizable under Title VII. Title VII jurisprudence makes an important distinction between (1) "ultimate employment decisions" and (2) mere "interlocutory or mediate decisions" which have no immediate effect upon employment conditions, but which might lead to an ultimate decision. The former can be actionable under Title VII, while the latter cannot, regardless of motivation. *See Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.1997); *Dollis v. Rubin*, 77 F.3d 777, 781-82 (5th Cir.1995) (per curiam); *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir.), *cert. denied*, 454 U.S 892 (1981). *See also Burlington Indus., Inc. v. Ellerth*, 524, U.S. 742, 761 (1998) (noting, in a sexual harassment case, that "a tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").

"'Ultimate employment decisions' include acts 'such as hiring, granting leave, discharging, promoting, and compensating.'" *Mattern*, 104 F.3d at 707 (citations omitted). On the other hand, changing an employee's work schedule, hours, or increasing an employee's workload are merely administrative decisions and do not constitute the type of ultimate employment decisions contemplated by Title VII. *See Benningfield v. City of Houston*, 157 F.3d 369, 377 (5th Cir.1998), *cert. denied sub nom. Benningfield v. Nuchia*, 526 U.S. 1065 (1999). Other examples of non-actionable, interlocutory decisions include purely lateral transfers. *See Burger v. Central Apartment Management, Inc.*,

168 F.3d 875, 879 (5th Cir.1999). "A transfer involving no reduction in pay and no more than a minor change in working conditions will not do, either." *Id.* (quoting *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir.1996) (Posner, J.)).

In the present case, when Tollett returned to work after a ten-month self-imposed absence, two of her supervisors allegedly expected her to resume field training. Although it is disputed whether Tollett had already completed her field training when she left her job due to her pregnancy, that dispute is immaterial. Chief Harter, the official decisionmaker, never advised her that she would be required to re-train in order to resume her duties as a reservist, and she never mentioned to Chief Harter that her supervisors insisted that she re-train. Thus, there is no proof that the City — the Title VII "employer" — took any position with respect to her training status.

Furthermore, and more fundamentally, regardless of whether Tollett was required to re-train upon returning to work, such a requirement – that an employee undergo *more* training than what may be required for others – does not by itself tend to affect the terms and conditions of employment in a way that violates Title VII. *Cf. Shackelford v. DeLoitte & Touche, LLP*, 190 F.3d 398, 407 (5th Cir. 1999) (holding that *denial* of training that does not tend to result in a change of employment status, benefits or responsibilities is not an adverse employment action covered by Title VII). No evidence exists to show that Tollett would have received any tangible employment benefit if the City had deemed her training complete. For even as a *fully trained* reserve officer, Tollett's pay and benefits would have remained the same: zero. Nor is there any evidence of any qualitative difference between Tollett's responsibilities as a trainee and what her responsibilities would have been as a reservist who had completed her training. Although in her brief she labels reservist trainees as "probationary employees," thereby suggesting the existence of some material distinction in status between trainees and non-trainees, there is no basis in the record for it.

4. Untimeliness.

Although an independent action under the residual clause of Rule 60(b) is not subject to the absolute one-year time limit imposed on Rule 60(b)(3) fraud motions, all Rule 60(b) motions, even those filed under the residual clause, must be "made within reasonable time." FED. R. CIV. P. 60(b). Tollett, of course, had ample time to submit a Rule 60(b)(3) motion before the one-year deadline since all of the evidence on which she based her present fraud claim was available to her at the time of trial.

It is fundamental that equity will not grant relief from a judgment if the complaining party, by exercising proper diligence, would have had an adequate remedy at law. As discussed above, Tollett's Rule 60(b) motion is a rehash of the Rule 59 motion she timely filed in 1998, and which the District Court and the Fifth Circuit rejected. If it is Tollett's position that her Rule 60(b) motion presents new arguments not addressed in her Rule 59 motion, she certainly made no effort to explain why she could not have presented them in a *timely* Rule 60(b)(3) motion. Accordingly, having failed to take advantage of the adequate remedy at law offered by Rule 60(b)(3), Tollett may not now seek relief in equity under the residual clause. *Campaniello Imports, Ltd. v. Saporiti Italia S.p.A.*, 117 F.3d 655, 662-63 (2d Cir.1997); *Wallace v. United States*, 142 F.2d 240, 244 (2nd Cir.) ("[o]bviously it cannot have been intended that what may be done within six months, pursuant to the body of Rule 60(b) may also be done thereafter, under the exception contained in its last sentence") (referring to predecessor to current Rule), *cert. denied*, 323 U.S. 712 (1944).

* * * * *

CONCLUSION

Accordingly, this Court should deny Tollett's petition for certiorari.

Respectfully submitted,

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(Any footnotes trail the end of each document.)

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OF TEXAS

UNITED STATES COURTS
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MAR 30 1998
Michael N. Milby, Clerk of Court

CIVIL ACTION NO. H-96-3131

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANDY G. TOLLETT,
Plaintiff,

v.

THE CITY OF KEMAH,
Defendant

PLAINTIFF'S, SANDY G. TOLLETT'S,
MOTION FOR NEW TRIAL

Plaintiff, Sandy G. Tollett, files this her Motion for New Trial consistent with the dictates of Rule 59, Federal Rules of Civil Procedure and Rule 4, Federal Rules of Appellate Procedure. Plaintiff would show unto the Court as follows:

GROUNDS FOR NEW TRIAL

1) Suppression of Evidence: A new trial in this should be granted in light of the proven suppression of evidence in this matter. If the Court remembers, the Plaintiff has previously filed a motion to compel and a motion for sanctions. The Defendant's counsel has failed to file a written response to any of the filings, but previously stated orally to the Court that no documents exist, The Defendant's counsel has also stated:

A. In opening statement, the Defendant's counsel asserted to the jury that no files existed for any of the other officers, and that the only file that existed was the file of the Plaintiff.

B. When the Defendant's witness was cross-examined on the point of no files existing, the witness feigned ignorance, stated that he had no personal knowledge, and informed the Court that the files were destroyed by former Chief Hartner. When this counsel questioned as to the Defendant's counsel statements made in opening statement, an objection was stated, "I didn't make that statement," and a speaking objection followed, "those files have nothing to do with discrimination,"

C. When the Court pressed, outside the presence of the jury, as to the existence of the employment files, the Defendant's counsel took a number of positions; i) that the files didn't exist; ii) that the Court had somehow modified its order; iii) that it would produce only the files from a certain period (after 1995) (period related to after former Chief Hartner had gone from the Department). This last statement was made by the Defendant's witness and in essence was the perjury of the witness Munoz. The defense lawyer at no point in time sought to correct the record, supported the contention of the Defendant, no matter which way the wind blew and participated fully in muddling the record before the jury, and/or in any presentation to the Court. It wasn't until the Court threatened counsel with the intervention of the Federal Bureau of Investigation did he agree to produce the files. The Court's position was taken on March 11, 1998. The next day, March 12, 1998, the Defendant's counsel showed up with files of employees who were full-time paid and full-time non-paid officers. At no time during this sad rendition of total disobedience of the Court's order did the Plaintiff have access to the comparable files of other officers.

2) A Fair Trial Was Denied by Virtue of the Trial Counsel's Support of Perjury and the Intentional Misleading of the Court. The absence of the relevant and ordered

materials worked to deprive the Plaintiff of a fair trial. First, all available ordered information was not produced to the Plaintiff. Secondly, the Plaintiff's lawyer was required to try its case on a fiction and not allowed to bring out that counsel/City of Kemah actually lied about the documents not existing. The jury was allowed to assume that counsel for the Defendant was honorable and/or the City of Kemah was honorable and could be trusted.

The Fifth Circuit in defining the standard of review in the grant or denial of motions for new trials explained, in Massey v. Gulf Oil Corp., 508 F.2d 92, 94 (1975), the district court's role thusly: "[i]n this circuit the ruling of a trial judge in either granting or denying a motion for new trial is reviewable under an abuse of discretion standard. United States for use of Weyerhaeuser Co. v. Bacon Construction Co., 430 F.2d 420 (CA5, 1970) ; Telfair v. Zim Israel Navigation Co., 428 F.2d 127 (CA5, 1970), cert. denied, 400 U.S. 1009, 91 S.Ct. 568, 27 L.Ed.2d 6232 (1971); Willitt v. Purvis, 276 F.2d 129 (CA5 1960); Marsh v. Illinois Central R. Co., 175 F.2d 498 (CA5 1949). Although the trial judge's discretion is broad with respect to the granting of a new trial, the granting of a new trial constitutes reversible error under certain circumstances. See 6A Moore's Federal Practice 59.08[5], at 59-162-63."

The perjured testimony, misconduct of trial counsel and the suppression of evidence worked to deprive the Plaintiff of a fair trial. In light of the district court's findings in the grant of sanctions, a new trial should be granted in this matter, particularly in light of the prejudice associated with the misconduct of the attorney. Angelo v. Armstrong World Industries, Inc., 11 F.3d 957, 962 (10th Cir. 1993). Plaintiff did not wait until the verdict was rendered in this matter. Counsel for Plaintiff requested a continuance to review the documents, ask that a mistrial be granted in light of the late production of the documents, and informed the Court that he thought that the current status of the record provided ample opportunity for the jury to be confused and render an improper verdict for the Defendant. The jury never knew of the documents' existence/availability. The jury never knew

that the statements with respect to the former Chief Hartner were an actual lie. And finally, the jury never knew that Officer Munoz's statements as to his not having anything to do with the files were actual misstatements of testimony presented to the Court (outside the jury's presence) and testimony taken by the Court from others brought forward at the Court's request.

3) The Jury Disregarded the Court's Instruction; When the jury read its verdict, it also read a personal note to the City of Kemah. The personal note criticized the City of Kemah for not keeping records. The sad irony of this note is the position that Plaintiff found herself in.

First, Plaintiff discovered that the City, and its representatives1 actually lied about the documents.

Secondly, the Plaintiff had to proceed forward with trial, request a continuance or ask for a mistrial.

Thirdly, once, the Plaintiff requested a continuance and/or mistrial, and the same denied, the Defendant could lie and wait for a verdict. First, the jury could assume that the Defendant, its current representatives and its lawyer were innocent bystanders and not part of the old regime, thus the personal note. In fact, when the Court questioned Officer Swinney about the records, not before the jury, Officer Swinney admitted that the records were tendered to him by Chief Hartner and that he had stored the files in the file cabinet.

4) The newly discovered evidence is material and of such a character that a new trial with such evidence will probably produce a different result. In Marshall's U.S. Auto Supply v. Cashman, "{a} motion for new trial on the ground of newly discovered evidence must show that the evidence was discovered since the trial; must show facts from which the court may infer reasonable diligence on the part of the movant; must show that the evidence is not merely cumulative or impeaching; must show that it is material; and

must show that it is of such a character that on a new trial such evidence will probably produce a different result. Prisament v. United States, 5 Cir., 96 F.2d 865." Marshall at 111 F.2d 140, 142.

Currently, the Plaintiff is reviewing the documents in question. In fact, since the trial, one of Plaintiff's counsel (Terry Weir) has reviewed the employee files once and on the date of this motion is scheduled to review the documents a second time (March 30, 1998). The employee files to this date have not been copied and provided to the Plaintiff. Plaintiff has filed with the Court a Motion providing for the security of the sealed records, for the copying of the employee files at the Defendant's costs and the ultimate production of the documents.

Evidence is not cumulative: The employees' files are clearly not cumulative in light of the fact they were never produced. The defendant's stated position, before the Court and the jury, were the documents didn't exist. The statements of defense counsel serve as a representative of the City's position. Since the grant of the Motion for Sanction, the Defendant has sought to file a response to the Motion for Sanction (untimely under the Local Rules and Federal Rules of Civil Procedure) feigning ignorance and. a misunderstanding of the Court's previous rulings. It is impossible for the materials to represent cumulative evidence when the Defendant's agents, employees, assigns and attorneys were all part of the suppression of the evidence in this case.

Evidence is material: First, the importance of employment files cannot be understated. Thoughtful study of the employment files would reveal:

- who and what persons were comparable in context of time with the department, training, promotion, and field service.

- the information of comparable officers would allow the Plaintiff to engage in adequate discovery and the taking of

depositions to determine how other officers were assigned their hours for field service training.

- the employment files of other officers will reveal the employment history, evaluations, and how those other officers were treated. A material issue in the trial related to the unsigned employment evaluations of police officers, other than the Plaintiff. The question still exists A) whether other employment evaluations were in existence, B) whether the evaluations were signed by the employees. More importantly, the Plaintiff would be able to call to trial witnesses with knowledge of relevant information rather than moving through an examination without any knowledge of relevant impeachment evidence available.

Information that has been to date from review is found under the Exhibit "1," wherein the affidavit of Terry Weir is attached.

CONCLUSION

Clearly, the motion for new trial should be granted in light of "a miscarriage of justice would result if the verdict were to stand." This is particularly true in light of the suppressed evidence, the perjured testimony and the misstatement of trial counsel. If the current factual history were to become the rule of practice in the Southern District, there exists no detriment to trial counsels and their clients in seeking a verdict by lying, hiding documents, ignoring the Court's order, challenging the Court as to the availability of documents. Sanctions of five thousand dollars and court costs do not work as a deterrent to the miscarriage of justice mentioned herein.

Dated 30 March, 1998

Respectfully submitted,

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SOUTHERN DISTRICT
OF TEXAS Michael N. Milby, Clerk of Court

CIVIL ACTION NO. H-96 –3131

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANDY G. TOLLETT,
Plaintiff,

v.

THE CITY OF KEMAH,
Defendant

ORDER

The Plaintiff's Motion for New Trial, is granted. DONE AT HOUSTON, TEXAS on this the ___ day of _____ 1998.

KENNETH HOYT
UNITED STATES DISTRICT JUDGE

United States District Court
Southern District of Texas
FILED

JAN 12 2000

Michael N. Milby, Clerk

CIVIL ACTION NO. H-96-3131

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANDY G. TOLLETT,
Plaintiff,

v.

THE CITY OF KEMAH,
Defendant

PLAINTIFF'S, SANDY G. TOLLETT'S, AMENDED MOTION FOR SANCTIONS

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TABLE OF CONTENTS

I. PROCEDURAL HISTORY 2

II. CONDUCT OF COUNSEL 3

A. TRIAL CONDUCT 5

B. HOW FRAUD AFFECTED THE EXAMINATION OF THE WITNESSES 7

III. HISTORY OF THE CASE AFTER PRODUCTION OF RECORDS 11

IV. WHY THE SECRETING OF RECORDS RAISES TO THE LEVEL OF FRAUD ON THE COURT 13

A. HOW THE APPLICATION APPLIES TO RULE 60(b)(3) 13

B. RULE 60(b)(2) AND ITS APPLICATION 16

V. CONCLUSION 21

VI. CERTIFICATE OF SRRVICE 23

United States District Court
Southern District of Texas
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CIVIL ACTION NO. H - 96 - 3131

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANDY G. TOLLETT,
Plaintiff,

v.

THE CITY OF KEMAH,
Defendant

PLAINTIFF'S, SANDY G. TOLLETT'S AMENDED MOTION FOR SANCTIONS

Plaintiff files this her Amended Motion for Sanctions, pursuant to Rules 11 & 37, and under the dictates of Rule 60 (b) (2) (3) (fraud on the court). fn1 For good cause, the Plaintiff would show unto the Court as follows, to-wit:

Procedural History

1) This case was filed on September 26, 1996. The Plaintiff brought suit: contending that her employment with the Defendant City of Kemah was tainted by sexual animus that affected her relationship with her fellow employees, her training and ultimate recognition as a police Officer with the defendant City. Plaintiff's suit was brought under Title VII, 42 U.S.C. section 2000e.

On May 13, 1997, the Plaintiff filed a Motion to Compel full answers to her Request for the Production of Documents and First Set of Interrogatories, pursuant to Rule 37, Federal Rules of Civil Procedure. A response by the City of Kemah was filed on or about June 2, 1997. This Court granted the motion to compel on June 27, 1997 and ordered full and complete answers to the Plaintiff's First Set of Interrogatories and the production of relevant documents.

On October 9, 1997, the Plaintiff filed her Motion for Sanctions in that the Defendant refused to comply with the Court's order. The motion was carried along at the time of trial.

This matter was tried on March 10 - March 13, 1998.

Conduct of Counsel

2) The element of fraud was established early. At the docket call in this matter, counsel for the Defendant, William Helfand, held out the following:

I think we're simply at a point where the Plaintiff believes there are documents, and my client doesn't have documents (Tr. at Docket Call (unnumbered volume) at 7, lines 19-22) (emphasis added).

I represent a police department that when it went through a change of chiefs of police literally lost all the records that were under the prior administration/ And so, while I agree with Mr. Griffin that those records should exist in the management of a good city, good police department, they simply don't exist; and I don't have them to give (Tr. at Docket Call, id. at 7, line 25; 8, lines 1-6) (emphasis added).

Defense counsel then out-right misrepresented to this Court as he purported to read from the Plaintiff's Motion to Compel. The words of Defendant's counsel is more telling - "What they had asked for were - let me find the motion. The Plaintiff had asked for - - and the Court granted a motion to compel for

records and personnel files of employees who were - and I'm using quotes now because these were their words - similarly situated discriminated against because of a pregnant condition." (Tr. at Docket Call (unnumbered transcript) at 9, lines 21-25).

Defense counsel doesn't stop at that point though:

"The COURT: What records are, in fact, missing though? Are they just plain personnel files or what?

Mr. HELFAND: Yes, sir. That's the other problem. Practically all of the personnel FILES to the extent that they ever existed longer with the City of Kemah.
And there's some question, when I asked my clients, whether they were ever created and then were simply removed or destroyed or whether they simply weren't created.

There's some allegations that the former chief of police didn't keep records that he should have kept; and then there are other people who are of a camp that he kept records but then destroyed them or somehow removed them when he was removed from office (Tr. at Docket Call, id. at 9, lines 19-25; 10, lines 1-6) (emphasis added). fn2

After the docket call, the Defendant submitted the affidavit of the City Secretary seeking to adopt the similarly situated pregnant employee defense. After receipt at the affidavit, the undersigned forwarded a fax to defense counsel stating, "{w}ith respect to the Affidavit forwarded from the City Secretary's Office, it does not speak to the concerns of the Motion to Compel. You answer previously that certain document(s) existed. You also have produced some documents for Tollett - it is only logical that you/your client would have document(s) for other employees that form the basis for our request. To use code words, "similarly situated", ignored the Plaintiff requests." (facsimile attached to the original Motion for Sanction; filed 10/9/97; Doc. 34).

A. Trial Conduct. The Plaintiff's Motion for Sanction was carried along with the trial (Tr. at Vol. I at 31-33). The Court ordered that the question related to the existence or nonexistence of the employment files was properly the subject of cross-examination (Tr. at Vol. I at 33, lines 16-25; 34, lines 1-10). During the opening statement of defense counsel, the benefit to the defense with respect to the absent documents became clear;

Mr. Helfand;

I would submit to you it's the problem with discrimination cases. This lady has already admitted, and I think you will see in the evidence, there's nobody who is going to testify that decisions related to her were because she's a woman, no one. There are no documents , no memos that suggest that, nothing.

. . .

Two, I will prove to you, and she will tell you, if she testifies consistent with her prior deposition testimony, no witnesses, no documents, absolutely nothing, but her firmly held belief. And I don't mind for a second, and I will tell you again later, I don't mind for a second that she thinks it, but that's not proof of it and she won't prove it to you, because she will tell you there are no witnesses and no documents, that anything happened to her because of the fact that she's a woman.

She will not - - although her lawyer says she will, she cannot tell you, to the point that we can identify somebody, any man who is treated differently. Remember, her claim is that this happened because she's a woman. Oh, she will say, "There's a fellow named Charlie. I don't know his last name.

So. you can't find him, Bill. He's just named Charlie. And I think what happened to him was he went out and he got to come back, and I don't know whether it was the same as me." And I think when you hear that, you're going to see that's not evidence of a man being treated any differently.

(Tr. at Vol. I (opening statement of Defendant's counsel) at 144, lines 3-8, 23-25; 145, lines 1-16) (emphasis added)).

Later in the opening statement, defense counsel holds out that Plaintiff had her records, but the records for other officers simply didn't exist (Tr. at Vol. I at 147, lines 15-25; 148, lines 1-5). Defense counsel's theme would reverberate throughout the trial proceedings.

B. How fraud affected the examination of the witnesses.

As seen in the examination of Plaintiff: Defense counsel inquired to whether the Plaintiff had any evidence or documents showing that she was removed from the Field Training Program (Tr. at Vol. II at 239, lines 7-11). This form of examination was consistent with the defense counsel's posture that no documents existed to support the Plaintiff's cause.

In addition, the defendant's counsel inquired of the Plaintiff as to the name of another other officer that was accorded special privileges with respect to the officer's physical condition and not being required to go back in the training program. Plaintiff answered the question only with the first name of the officer because of the lack of documents. The documents were in the sole control of the Defendant and subject of the Plaintiff's discovery request (see examination at Tr. at Vol. II at 250, lines 21-25; 251, lines 1-2). The importance of this inquiry is clear: interrogatories submitted sought the name, addresses and telephone numbers of former officers. The document production supported the interrogatories in question. Documents were not produced. Defense counsel knew the answer would only be the first name of the officer and benefited from his disregard of the Court's order (Tr. at Vol. II at 255, lines 13-21 255, lines 16-21).

The examination of the City's chief witness (Munoz: This witness was the City's representative during the trial and his name was listed as the person providing the answers to the interrogatories the subject of the debate. The witness

provided that he certified that the files were not available, but claimed ignorance as to the files existence (Tr. at Vol. II at 317, lines 9-24). When the witness was asked about the City's lawyer's position that the only employment file that was available was the employment file of Plaintiff and that no other files were available, counsel (Bill Helfand) objected and stated, "I never said that." (Tr. at Vol. II at 320, lines 14-18). After the witness admitted that he had a personnel file (Tr. at Vol. II at 321, lines 12-25; 322, lines 12-25), the jury was removed by the Court.

When the jury returned Mr. Munoz affirmed that his file contained evaluations, psychological testing, time sheets, criminal history check documents, fingerprint cards and that all were required to be in an officer's file by the State of Texas (Tr. at Vol. II at 326, lines 22-25; 327, lines 1-25; 328, lines 12-15, 17-19).

After Munoz admitting to evaluating the Plaintiff, but not providing her a copy of any such undated evaluations and denied keeping the Plaintiff's time as her Field Training Officer (Tr. at Vol. II at 329, lines 1-8, 17-19; 330, lines 1-25; 335, lines 1-15), this Court understood the unlikely and highly unusual defense that was being taken. This Court then threatened a criminal investigation (Tr. at vol. II at 349, lines 21-25). Defense counsel then responded, "They don't have them" (emphasis added) (Tr. at vol. II at 350, lines 1-5). After defense counsel's statement, the Court again emphasized the federal and state law governing law enforcement officers' files (Tr. at Vol. II at 350, lines 6-25) . The defense lawyer then slightly modified his statement, "I records" (emphasis added). This Court then informed defense counsel that he would have the FBI go over and turn the police station upside down and put everyone in jail (Tr. at Vol. II at 353, lines 1-5).

The examination of the City Secretary, Kathy Pierce: This witness admitted that she possessed files for full-time police officers between years 1993-1996. The witness then "did not recall" whether she informed the court that Tollett's was the only employment file available. (Tr. at Vol. II at 408, Lines 18-

25; 415, lines 1-9; 416, lines 20-25; 417, lines 12-15). The admission by the witness begs the question: then why weren't the records produced when requested? In addition, the admission is totally contrary to the position taken by the defense lawyer before the jury and the statement that was made by defense counsel prior to her appearance in Court that "they don't have the records."

The witness also provided that she did not remember the request for information and that she did not recall being told to produce records (Tr. at Vol. II at 423, lines 1-6; 424, lines 1-16; 425, lines 1-6) . After this devastating admission takes place, defense counsel falls back on his similarly situated defense and contends that the Court only ordered only similarly situated officer's files. The Court rightly rejected the argument and then for the first time, without pulse, defense counsel utters, "I will have the Chief bring those records tomorrow." (Tr. at Vol. II at 431-433; see counsel's comments at 433, lines 1-14) + It should be noted that defense counsel, without conferring with any witness, city representative or his co-counsel, informed the Court that the records would be made available. The acts of counsel reveals knowledge on the lawyer's part in the fraud and the active use of fraud to prevail in the litigation.

History of the Case After Production of Records

3) Defense counsel was true to his word, the next morning defense counsel appeared with two file drawers of employment files, containing both full-time, non-paid and full-time, paid officers. When the files arrived, defense counsel expressed grave concerns with respect to the jury now having been misled and the condition of the record (Tr. at Vol. II at 438, lines 1-13). The Court, in response, requested the location of Captain Swinney and ordered that the witness appear as part of the Court's independent investigation with respect to the pending motion for sanctions.

Examination of Captain Swinney: Swinney Provided that he was the Assistant Chief at the time and was required to maintain records for non-paid officers, including the officer's time sheets (Tr. at Vol. III at 444, lines 1-18). Swinney also explained that if a person completed the field training program, he and the training officer would go the Chief and explain the successful completion (Tr. at Vol. III at 449, lines 1-11). -Swinney explained that if a Trainee failed the training process a note would be placed in the employee's file (Tr. at Vol. III at 454, lines 21-25; 455, lines 1-21). The witness affirmatively stated that no employment files were destroyed (Tr. at Vol. III at 450, lines 16-19; 452, lines 1-24; 454, lines 1-7; 456, lines 1-11)

Clearly, the witness revealed a willful disregard of the Court's order by defense counsel. More importantly, the testimony reveals that the counsel and his client were actively engaging in fraud on the court and jury in order to prevail in the litigation.

Testimony of Police Chief Keith Warren: As part of the court's hearing, the current police chief was called. In the Chief's explanation of why the documents were not provided, the following is revealed, to-wit:

Back in July when I met with Mr. Helfand, I think I got the wrong impression. I thought he wanted the record for everyone that was here from X date to X date, fn3 and that's what we produced. fn4

I've had most of the files ever since I came in October of 1995 after I put them together. They were in about three or four different file cabinets, in a desk drawer, and I compiled everything into one central location. And when Helfand called me last night, I said, "There's no problem. I boxed everything up, and we'll be there first thing in the morning."

(Tr. at Vol. III at 461, lines 22-25)

Why the Secreting of Records Raises
to the Level of Fraud on the Court

4) How the application applies to Rule 60(b) (3). First, fraud is seen by the differing story the witnesses/defense took outside the presence of the jury and the story told before the jury. The jury never knew of defense counsel's and Pete Munoz's statement that Chief Hartner had destroyed the documents was actually a lie. The jury never knew the Officer Munoz' statement as to his not having anything to do with the files was actually different than what he told the Court outside the jury's presence and contradicted by other witnesses. In addition, the jury would never hear Officer Swinney explain that the records were retained, stored and the notion of destruction of the records was simply folly.fn5

The documents secreted by the Defendant and their counsel consisted of some 4,874 pages (summary and documents will be labeled and admitted as Exhibit "25" at the hearing on sanctions). The Fifth Circuit in Rozier v. Ford Motor Co. 573 F.2d 1332, 1339 (5th Cir. 1978) explained that "although Rule 60(b) (3) applies to misconduct in withholding information called for by discovery, . . . it does not require that the information withheld be of such nature as to alter the results in the case." Clearly, the evidence in this case is laden with proof associated with misconduct and fraud in the discovery process. Defendant's counsel initial reaction to the discovery sought was to contend that the information was privileged. After the Court granted the Plaintiff's motion to compel, the Defendant simply ignored the Court's order and failed to produce the materials. As the trial in this matter approached, Defendant sought to restyle the Court's order and had the City Secretary swear to an affidavit (see Order granting sanctions, Doc. 54) as a request for "similarly situated employees." In fact, at the docket call, the defense counsel intentionally misstated the history of the case and pretended to read "similarly situated" in the discovery request when no such words existed in the motion (emphasis added). Even after a letter (facsimile) was forwarded from the Plaintiff's counsel reminding Defendant's counsel of the actual wording

of the request and order, the Defendant's counsel and his client failed to produce the documents. At trial the conduct only got worse.

One could argue that justice is served by the reinstatement of the $5,000.00 sanction against the City Defendant, but the same ignores the true history of this case. Defense counsel's and defendant City would gladly pay a mere five thousand dollar money judgment to avoid liability under the Civil Rights Act. To tolerate counsel's acts, the conduct of the defendant and defendant's agent would encourage further disrespect for our judicial system. In Rozier v. Ford Motor, supra at 1346, the Fifth Circuit stated that the granting of relief under Rule 60 (b) (3) is within the discretion of the trial court. In addition, the Court explained that the rule is remedial and should be liberally construed.

Relief under 60(b) (3) should be granted.

5) Rule 60 (b) (2) and its application. Under Rule 60 (b) (2), the moving party must show that the newly discovered evidence is "such that a new trial would probably produce a new result." Ag Pro, Inc. v. Sakraida, 512 F.2d 141, 143 (5th Cir. 1975). Even under Rule 60(b) (2) a new trial should be granted.

As related to the files produced no training records in the file for the following officers: Stephanie S. Armstrong, Paul Armand, Barry Balthrop, William Wayne Belotte, Robert Dale Boulet, Daniel J. Cantu, Lonny Carney, Anthony Robert Cartwright, Larry Caswell, Christopher Cordary, Mark D. Cruse, William Clareke Dubose, Thomas Lee Fowler, Gary Hartner, David Haynes, and Pauline Hepler. The absence of the training records is critical in context of Texas law requiring the game. In addition, the absence of training records supports the Plaintiff's position that her file not containing records relieving her from the Field Training Procedure is consistent with other files not containing any such information and the officers having successfully completed the Field Training Program.

Training records exist in some officers' file, including Gary Dean Harwell (reflecting the following notation; "I am unable to give you a set schedule, because I am unable to work without Sgt. Munoz." This statement is consistent with Tollett's testimony that she couldn't volunteer time. This information is contrary to the City's position at trial and contrary to Officer Young's testimony that one only had to volunteer time to get off the FTO program. Young being the Plaintiff's comparable was fast-tracked (treated differently) contrary to the Plaintiff's treatment). Also reference to Officer Barry Penland's records which contains counseling forms for reporting to work when training officer not present.

The competence of the Plaintiff is enhanced by negative information contained in other officers files, even though those officers were considered full-time officers.

* Peter Munoz arrested and charged on or about July 28, 1994 with the office of theft by check. On October 28, 1998, the Texas Commission on Law Enforcement reprimanded Munoz (copying the City of Kemah) for the failure to report the criminal offense. This information is not contained in the records produced by the City of Kemah, but the facts came to the Plaintiff's attention after the trial (to be labeled as Exhibit "26", sanctions hearing exhibit).

* Paul Young (the comparable at trial). Personal history questionnaire stated, "I had experimented with marijuana a few times under peer pressure." Young came into the department at the same time as Plaintiff, was given training hours while the Plaintiff was not but also had adverse information in file that the Plaintiff did not. At trial, the Defendant's witnesses stated that no such records for Young existed. The importance of these records is seen in context of the comparison to the Plaintiff's complaint that she could not get the training hours as Officer Young. The training records for Officer Young is telling {Job Interview Documents - Recommendation to hire ("Subject will needs lots at training could make a good officer"; "Mr. Young seems knowledge in Police Procedures. Needs FTO Programs but I feel he would

wake a good officer"; " . with training in our procedures will probably make a good officer. He is worth a try"; "Young needs training"; "Appears eager to learn. Experience limited which shows in difficulty in answering some not very difficult questions."

* Eric Baumgart. Previous criminal history (criminal conviction/Nebraska (1989); criminal charge, Liberty County (1988).

* Michael Heath Butchee - TCLEOSE document reflecting terroristic threat and personal history document reflecting marijuana use (twice)).

* Lonny Carney assaults, multiple reprimands in file.

* Sean P. Friebele - terminated from FTO program for City of League City, but hired by the City of Kemah and placed in FTO program even with past failure .

* John Patrick Kruger - application reveals used marijuana 5 times, driver under the influence of alcohol 4 times.

* Patrick Edwards Zollard. The only officer that sheets are contained in the file. The issue of record keeping time records is important in context of discovery and ultimate cross-examination of the government's witnesses.

* Gerald Franklin Witt. Hired as a full time officer; previous resignation 2/18/91 for incident not reported in file. No FTO documents in the tile. No TCLEOSE Summary Documents in file. One of the issues at trial related to the opportunity given the Plaintiff. Witt would become a comparative person.

And finally reference to the file of David Haynes is important. Contained in the records is a memorandum from Pete Munoz dated 1/8/96 which request Officer Haynes to "compile the total hours for each non-paid for the months of November and December." This memorandum flies directly in the face of the trial testimony of Munoz and the verbal position taken

by the Defendant's counsel. The memorandum also support the fraud on the Court allegations.

The Court should grant relief under Rule 60(b) (2).

6) Rule 37 (b) (2) provides, "[i]f a party or an officer director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule, or Rule 35, or if a party fails to obey an order entered under Rule 26 (f), the court in which the action is pending may make such orders in regard to the failure as are just. Coupled with the relief sought under Rule 60 (b) (2) (3) (new trial), the Plaintiff seeks a sanction amount of $150,000.00 (Rule 37 and Rule 11) and attorney fees in the amount of $75,000.00 under the provisions of Rule 37.

The attorney fees are reasonable and necessary in context of the discovery malfeasance and all matters related to same. With respect to billing discretion, the following matters were excluded and/or not billed, to-wit:

a) fees for time on appeal to the Fifth Circuit (approximately 100 hours);

b) fee associated with associate time surrounding review of employment records (approximately twenty hours); and

c) paralegal time that would be duplicative of work performed and/or billed for associate time and/or attorneys time (30 hours).

CONCLUSION

It is prayed that this motion be granted in all parts and that a finding of fraud on the court be entered under Rule 60 (b) (3). Such findings, after hearing, should be directed against both the Defendant City and the Defendant's former counsel,

William Helfand, Magenheim, Bateman, Robinson, Wrotenbery & Helfand.

It is prayed alternatively that the court find that the newly discovered evidence meets the standard set out herein within with respect to Rule 60 (b) (2) . It is prayed that any such finding, after hearing, be directed against both the City of Kemah and the Defendant's former counsel, William Helfand, Magenheim, Bateman, Robinson, Wrotenbery & Helfand.

It is prayed that sanctions be entered in the amount of $150,000.00 and such sanctions be entered against both the Defendant City and the Defendant's former counsel, William Helfand, Magenheim, Bateman, Robinson, Wrotenbery & Helfand.

It is prayed that attorney fees be entered in this matter in the amount of $75,000.00.

After all the above is said and done, a new trial should be granted to the Plaintiff in this matter and/or part and parcel of any such new trial, the striking of the Defendant's pleadings and the entering of judgment for the Plaintiff. No further insult of the federal judiciary should take place but for the conduct of the Defendant and its counsel.

DATE: JANUARY 12, 2000.

Respectfully submitted

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ATTORNEY- IN-CHARGE

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Footnotes

fn1 Rule 60 (b) (2) & Rule 60 (b) (3), Federal Rules of Civil Procedure provides, "{o}n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentations, or other misconduct of an adverse party." The rule also provides that the motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceedings was entered or taken, The final judgment in this matter was entered on March 20, 1998. The appeal to the Fifth Circuit Court of Appeals was taken on June 12, 1998 and affirmed by the Court on September 13, 1999. The Fifth Circuit refused to address the Rule 60 (b) complaint saying that "because this claim was raised for the first time on appeal, we shall not address it. See Shanks v. Allied Signal, Inc., 169 F.3d 988, 993 n. 6 (5th Cir, 1999)."

Even if it is deemed that the Rule 60 (b) (3) complaint herein is untimely (intervening appeal), Rule 60 also provides that "{t}his rule does not limit the power of a court to entertain an independent action to relieve a party from judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C. section 1655, or to set aside a judgment for fraud upon the court." (emphasis added) Hazel-Atlas Glass Co. v. Hartford Empire Co., 322 U.S. 238 (1944) (rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause).

fn2 The Defendant's counsel does tell who makes the "allegations" with respect to the record(s) location, but simply floats a number of trial balloons as to why the documents do not exist.

fn3 If this is true, then why weren't these records produced? Why does defense counsel only produce Tollett's records and no others and then tell the Court and the jury that it only had the records for the Plaintiff? How can defense counsel stand before the Court on one occasion and say that his client does not have the records and then on another occasion state "I don't have the records?"

fn4 Clearly, the witness conveys that the records were produced in July. If the witness' statements are true, it would appear that the records were secreted by defense counsel.

fn5 The Defendant stated in discovery that it did not know the location of Officer Swinney. When the Court inquired, outside the presence of the jury, Officer Swinney's current employment was immediately tendered. The importance of Swinney's testimony is readily seen.

CIVIL ACTION NO. H - 96 - 3131

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

SANDY G. TOLLETT,
Plaintiff,

v.

THE CITY OF KEMAH,
Defendant

ORDER

On this the 7th day of March, 2000 came on to be heard the Plaintiff's Amended Motion for Sanctions. The Court previously entered sanctions against the City of Kemah, without hearing. The Fifth Circuit Court of Appeals remanded this matter for a hearing for a redetermination and assessment of reasonable attorney's fees and costs under Rule 37. The hearing herein is also based upon Rule 60(b) (3) and Rule 60(b) (2), FED.R.CIV. PROC. and Rule 11, FED.R.CIV. PROC.

After consideration of the testimony taken in the hearing in question, review of the previous trial transcript it is the opinion of the Court that the following order is appropriate in this case, to-wit:

1. The Plaintiff is awarded a new trial in this matter. The trial date shall be set for ___ 2000;

2. The Plaintiff is awarded $150,000.00 in sanctions for the conduct of the Defendant and the Defendant's former counsel, William Helfand and the firm of Magenheim, Bateman, Robinson, Wrotenbery & Helfand;

3. The Plaintiff is awarded $75,000.00 in reasonable and necessary attorneys fees associated with the Court's finding of fraud on the court. Such fees are taxed jointly and severably against both the City of Kemah and William Helfand and the firm of Magenheim, Bateman, Robinson, Wrotenbery and Helfand;

4. It is the finding of this Court the defendant City of Kemah and Defendant's former counsel, William Helfand and the firm of Magenheim, Bateman, Robinson, Wrotenbery and Helfand have engaged in fraud on the court and such fraud was intentional, without regard to truth and designed to stymie the intent of the federal rules of discovery.

DONE AT HOUSTON, TEXAS on this the___ day of ___ 2000.

HONORABLE KENNETH HOYT
UNITED STATES DISTRICT JUDGE